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APPRAISAL OF THE GROUNDS FOR CHALLENGING ARBITRAL AWARDS: THE PRACTICE IN U.S. AND CANADIAN COURTS

BY

Remigius Oraeki Chibueze

A thesis submitted to the faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Laws.

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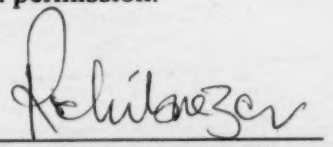

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This thesis is dedicated to the memory of my mother - Catherine Chibueze, grandmother - Adaku Chibueze

AND

Grandparents - Raphael and Grace Okafor

ABSTRACT

The acceptability and usage of international commercial arbitration as a mechanism for the settlement of international commercial disputes has continued to expand since the end of the Second World War. Today, many contracts between nationals of different states contain an arbitration agreement. Arbitration has become the preferred means of resolving international commercial disputes.

In response to the increasing use of arbitration, international instruments have been concluded to ensure the recognition and enforcement of arbitral awards by national courts where the enforcement of the awards are sought. In order to minimize challenge to the enforcement of an award, the instruments provide limited grounds for attacking the recognition and enforcement of the awards. However, these limited grounds notwithstanding, post-award litigation has not abated.

Therefore, the objective of this thesis is to present a general appraisal of the interpretation of the grounds for challenging the recognition and enforcement of arbitral awards based on the U.S. and Canadian jurisprudence. In addition, the study will proffer recommendations with the objective of reducing the challenges to the recognition and enforcement of arbitral awards.

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CHAPTER 1

INTRODUCTION

> Broadly speaking, arbitration is a contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in the place of the tribunals provided by the ordinary processes of law.[1]

The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. But judicial hostility and national scepticism hindered arbitration up to the early nineteenth century. The courts regarded arbitrators as usurpers of the judicial functions of national courts and states viewed the concept of arbitration as an intrusion into their sovereign powers to regulate national commerce and judicial systems. Thus, early domestic statutes and judicial decisions discouraged the use of international commercial arbitration.[2]

However, with the expansion of international trade, especially after the end of the Second World War, and the increasing complexity of international business relationships, arbitration has become the preferred method of settlement of international commercial disputes.[3] Thus, the initial prejudice against arbitration yielded to practical necessity and the advantages which the arbitration process presents to international business persons as compared to the traditional method of litigation of disputes. The courts have moved away

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[1] *Gates* v. *Arizona Brewing Co.*, referred to by Martin Domke, *Domke on International Arbitration* (Illinois: Callaghan & Company, 1968) 1.

[2] Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Deventer: Law & Taxation Publishers, 1981) at 6.

[3] J-G. Castel, A. de Mestral, W. Graham, *The Canadian Law and Practice of International Trade*, 2nd ed. (Toronto: Edmond Montgomery Publications, 1997) at 722.

from their initial judicial resentment and jealousy of the arbitration process, replaced by genuine respect and the increased willingness of national courts to transfer commercial cases to arbitral tribunals and to enforce arbitral awards.

The change of perception toward arbitration and its phenomenal growth in international transactions was succinctly noted by the Honourable Mr. Justice Sir Michael Kerr, as follows:

> Since the last [World] War, arbitration has become something of a forensic industry all over the world. The extent to which it predominates over litigation in domestic cases, where both parties are subject to the jurisdiction of the same courts, is difficult to asses; there appear to be no statistics, and different practices no doubt prevail in different countries. *But in international cases, where jurisdictional problems are bound to arise in the event of dispute, the practice of incorporating arbitration clauses into contracts is becoming almost universal.*[4]

International commercial arbitration instinctively appeals to business persons because of its advantages over litigation. Importantly, arbitration affords the parties the opportunity to structure their arbitration arrangements in order to suit their particular needs.[5] Implicit in this principle is the freedom to select those who will determine their dispute, the place of arbitration, the law that will govern the resolution of the dispute, and the applicable language. This wide latitude enjoyed by the parties by opting for arbitration is not available when litigation is initiated in the domestic courts of a state.

In addition, arbitration is considered expeditious, cost effective and a flexible procedure devoid of the technicalities of the law court. The use of technical experts

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[4] Michael Kerr, "International Arbitration V. Litigation" (1980) Journal of Business Law 164 (emphasis added).

[5] Karl-Heinz Bockstiegel, "The Role of Party Autonomy in International Arbitration" (1997) 52 Dispute Resolution Journal 3 at 25.

knowledgeable in the particular issue in dispute gives the parties the confidence that the issues will be better appreciated by the arbitrator(s). Also, arbitration proceedings are confidential and decisions are usually not made public except with the consent of the parties. This helps to shield both the proceedings and the business details of the parties from public view.

However, while speed, informality and economy remain the hallmarks of arbitration, the main influence on the growth of international commercial arbitration has been the desire of each party to avoid having its case determined in a foreign judicial forum. The parties' unwillingness to have their disputes litigated in foreign courts is based on the fear that they will be at a disadvantage due to unfamiliarity with the legal system of the foreign jurisdiction, language barriers, and possible national bias leading to a "hometown judgment."[6]

Besides, there is the additional risk that a national court judgment will be subject to one or more instances of appellate review, thus, resulting in further delay and uncertainty in the ultimate disposition of the matter.[7] Furthermore, given the absence of multilateral conventions for the recognition of foreign judgments, even where a foreign judgment is satisfactory there is often doubt about whether the decision can be enforced in another country. Thus, the difficulty of enforcing judgments abroad continuously weigh against the use of national courts to settle international commercial disputes.[8]

In contrast, the reception and use of international commercial arbitration has resulted

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[6] Laurence W. Craig, "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration" (1995) 30 Texas International Law Journal 1 at 3.

[7] Per Justice Blackmum in *Shearson* v. *McMahon*, 482 U.S. 220 at 257-58 (1987).

[8] Michael J. Mustill, "Arbitration: History and Background" (1989) 6 Journal of International Arbitration 43. See also Albert van den Berg, "Why Arbitration Will Be Us Always" (1999) 65 Journal of the Chartered Institute of Arbitrators 248 at 249.

in the conclusion of bilateral and transnational instruments and other measures on international commercial arbitration by which arbitration systematically acquired a more solid legal standing.[9] These bilateral and transnational instruments provide an international legal framework for the recognition and enforcement of arbitral awards. The instruments were aimed at making arbitration agreements effective and awards legally enforceable.

By far, the most important convention on international commercial arbitration is the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[10] (hereinafter the New York Convention), which entered into force in 1959. The Convention put into place a treaty system which now assures the recognition and enforcement of foreign arbitral awards within contracting states. The 1958 New York Convention also limits the grounds of judicial review of arbitral awards and excludes any judicial review of the merits of an arbitral award by the court where enforcement of the award is sought.[11]

In 1985, the United Nations Commission on International Trade Law (UNCITRAL) drafted the *UNCITRAL Model Law on International Commercial Arbitration*[12] to serve as a blueprint for the reformulation of national arbitration laws.[13] The Model Law embodies the modern legislative trend in international arbitration law and covers virtually all aspects of

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[9] Paolo Contini, "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1959) 8 American Journal of Comparative Law 283 at 285.

[10] U.N. Doc. E/CONF. 26/9/Rev. 1, reprinted in 330 U.N.T.S. 38 (in force June 7, 1959).

[11] Laurence W. Craig, *supra* note 6 at 3.

[12] U.N. Doc. A/40/17 (1985), reprinted in (1985) 24 I.L.M. 1302 (hereinafter the Model Law).

[13] See Vikram Raghavan, "Heightened Judicial Review of Arbitral Awards: Perspectives from the UNCITRAL Model Law and the English Arbitration Act of 1996 on some US Developments" (1998) 15 Journal of International Arbitration 103 at 123.

arbitration.[14] The major features of the Model Law are its recognition of the autonomy of the parties to the choose the applicable substantive law and procedural rules that will govern the resolution of their disputes, and the independence of the arbitral tribunal in conducting the arbitration proceedings.[15] The Model Law also provides for minimal judicial intervention in the arbitral process, contains provisions for the setting aside of an award at the place where it is made and adopts the limited grounds in the New York Convention by which an international arbitral award may be challenged.[16]

While more than 120 countries have signed the New York Convention, only about twenty-eight countries and eight states in the United States have adopted national arbitration laws based on the Model Law provisions. Consequently, in many states today, the New York Convention and/or the Model Law provide the legal framework for the recognition and enforcement of international commercial arbitration awards.

Generally, arbitral awards may be challenged through a petition for setting aside the award in a court in the same country or legal unit where or under the law by which the award is made. Arbitral awards may also be challenged in other countries where the award is sought to be enforced, i.e. outside the country or legal unit where the award is made. The limited grounds by which an award may be challenged as contained in the Convention and the Model

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[14] Okezie Chukwumerije, "Reform and Consolidation of English Arbitration Law" (1997) 8 American Review of International Arbitration 21 at 21-22.

[15] *Ibid.*, at 22 (footnote 7), Robert K. Paterson, "International Commercial Arbitration Act: An Overview", in R. K. Paterson & Bonita Thompson, eds.,*UNCITRAL Arbitration Model in Canada: Canadian International Commercial Arbitration Legislation* (Toronto: The Carswell Company Limited, 1987) 113 at 114-115.

[16] Okezie Chukwumerije, *ibid.*, Henri C. Alvarez, "Judicial Intervention and Review under the International Commercial Arbitration Act" in Robert K. Paterson and Bonita Thompson, eds., *UNCITRAL Arbitration Model in Canada: Canadian International Commercial Arbitration Legislation, ibid.*, at 137-139.

Law have been the subject of considerable jurisprudence. Thus, the main thrust of this study is to carry out an appraisal of the U.S. and Canadian courts' interpretations of the grounds for challenging the recognition and enforcement of arbitral awards.

The courts have construed narrowly the limited grounds providing for the challenge of arbitral awards, declining to refuse the recognition and enforcement of awards on flimsy grounds. The courts have also permitted arbitration of sensitive public law issues, such as antitrust, securities regulation or claims against a bankrupt, that were traditionally deemed non-arbitrable.[17] However, this has not abated post-award litigation.

Two related issues that international commercial arbitration has had to grapple with are the quest for greater party autonomy and the extent to which the arbitral process should be independent of national laws or state control. Different reasons have been adduced by those in support of state control of the arbitral process. It has been argued that national courts supervise arbitral proceedings to ensure legally correct results. Another reason is that arbitration is subject to judicial control only to safeguard its fundamental fairness.[18]

On the other hand, others have argued that arbitration should be freed from any constraints imposed by the legal system of the state, except to the extent agreed by the parties. The proponents of this view argue that broad review of the arbitral process and award

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[17] William W. Park, "Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration" (1986) 12 Brooklyn Journal of International Law 629.

[18] William Park, "The Lex Loci Arbitri and International Commercial Arbitration" (1983) 32 International and Comparative Law Quarterly 21.

would rob arbitration of much of the efficiency that distinguishes it from litigation.[19] They contend that there is now a philosophy of increasing *laissez faire* allowing the arbitral process to become much more autonomous and free from judicial intervention. The call for the independence of the arbitral process has been attributed to the pressure towards harmonisation and virtual unification of national laws and procedures concerning international arbitrations.[20]

A contrary view has however emerged which argues that arbitration cannot function independently without the assistance of national courts.[21] The fact of the matter is that court intervention in arbitration results from an attempt by one of the parties to an arbitration agreement to renege from its earlier undertaking to arbitrate disputes arising from its business relationship with the other party. The court will also intervene when the disappointed loser of an arbitration resists the enforcement of the award under any of the limited grounds provided in the New York Convention and/or the Model Law.[22]

Where the court is asked to enforce the arbitration agreement or award, this will inescapably require the courts to ask whether the dispute is covered by the arbitration

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[19] See Steven J. Stein & Daniel R. Wotman, "International Commercial Law in the Twenty-First Century: A Role for Governments in the Resolution of International Private Commercial Disputes" (1995) 18 Fordham International Law Journal 1720, Jessica L. Gelander, "Judicial Review of International Awards: Preserving Independence in International Commercial Arbitrations" (1997) 80 Marquette Law Review 625.

[20] Michael Kerr, "Arbitration and the Courts: The UNCITRAL Model Law" (1985) 34 International and Comparative Law Quarterly 1 at 4-5.

[21] Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Westport, Connecticut: Quorum Books, 1994) at 180, Pierre Mayer, "Mandatory Rules of Law in International Arbitration" (1986) 2 Arbitration International 274 at 284-285.

[22] William W. Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration" (1989) Tulane Law Review 647 at 655.

agreement, and whether the arbitrator respected the limits of its authority and the fair play bargained by the parties. Thus, by resorting to the courts to challenge arbitral awards, the idiosyncrasies of national law are brought into play.[23] As a result, Professor Park has argued that to expect the courts to enforce arbitration agreements and awards without considering the application of "national legal peculiarities would be a logical impossibility, like both having and eating the proverbial cake."[24]

This clash of philosophy provides the dividing line between representatives of the various states and international arbitration institutions that participated in the conclusion of transnational instruments on arbitration. However, the consensus that arbitration provides a more suitable mechanism for the resolution of international commercial disputes was the unifying factor that resulted in a compromise between those opposed to party autonomy and those against state control of arbitration.

This notwithstanding, an enduring tension in arbitration law is how to strike a balance between respect for the interest of the parties in speed, flexibility and finality, and the desire of states to ensure the integrity and fairness of the system.[25] The New York Convention is designed with a bias for effective enforcement of arbitral awards. The Model Law contains provisions which abhor dilatory tactics during the arbitral proceedings and demand prompt objections to procedural non-compliance.

In this thesis, I am concerned with how arbitration can maintain its advantages of

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[23] William W. Park, *supra* note 22 at 674.

[24] *Ibid.*

[25] Okezie Chukwumerije, *supra* note 14 at 23.

speed and lower cost without compromising the inevitable judicial supervision of the arbitral process and award. I will argue that post-award challenges based on the procedural defences in Article V(1)(a-d) of the Convention and Article 36(1)(a)(i-iv) of the Model Law are inconsistent with the pro-enforcement objective of the Convention and the principles of party autonomy and independence of the arbitral tribunal guaranteed by the Model Law.

I will, therefore, review judicial interpretations of the grounds for the challenge of arbitral awards which inevitably results in judicial review of the arbitral process. The issues addressed in this thesis are not just the grounds for challenging awards, but, importantly, the timing and the geography of judicial review - the "when" and "where" of court intervention.

In Chapter 2, I will discuss the historical development of transnational conventions and instruments on international commercial arbitration in order to show how the provisions on the recognition and challenge of arbitral awards were conceptualised. In Chapter 3, I will discuss the salient provisions of the 1958 New York Convention and the Model Law. The overview of the Convention is undertaken in order to describe the legal framework for the recognition and enforcement of foreign arbitral awards. This dovetails with the overview of the Model Law which highlights the substantive procedure for the conduct of arbitration and the extent to which the parties and the arbitral tribunal have been left free to control the arbitral process.

A series of cases have been decided on the basis of the Convention and the Model Law, particularly within the United States and Canada. In Chapter 4, I will appraise the courts' interpretations of the grounds for challenging arbitral awards *vis-á-vis* the pro-enforcement objectives of both instruments. In reviewing judicial interpretations of the

grounds for challenging the recognition and enforcement of an award, I have deliberately chosen the U.S. courts to provide insights into the enforcement of awards under the Convention because, except for eight states, the Model Law has not been adopted in the U.S. Also, I have chosen Canadian jurisprudence because the Model Law has been adopted throughout Canada (as has the New York Convention).

In Chapter 5, I will proffer some recommendations aimed at curtailing post-award challenge. This chapter also contains recommendations for facilitating the enforcement of arbitral awards and streamlining state control of the arbitral process. My conclusions will be stated in Chapter 6.

CHAPTER 2

HISTORICAL DEVELOPMENT OF TRANSNATIONAL AGREEMENTS ON INTERNATIONAL COMMERCIAL ARBITRATION

2.1. INTRODUCTION

This chapter examines the development of transnational treaties and instruments on international commercial arbitration. Professor Carbonneau provides an insight into the issues addressed in this chapter when he stated that:

> It would have been difficult for major trading nations to maintain totally contradistinctive attitudes toward arbitration in .... international matters. Moreover, in each country, a basic recognition prevailed that special and less restrictive rules should apply to judicial supervision of international arbitral proceedings, whether conducted domestically or abroad. The courts were the primary vehicle for establishing that recognition, although in each jurisdiction legislation either provided the incentive for or eventually confirmed the judicial position.[1]

He summarised the reasons for international instruments to regulate state practices regarding international commercial arbitration by making three salient points. First, he pointed out that if states maintain different attitudes (which include different national laws and views) toward international commercial arbitration, this will be inimical to commercial arbitration. Second, trading nations are aware of the need to apply limited judicial supervision to international commercial arbitration. Third, the recognition and enforcement of commercial arbitration awards lies with national courts. Thus, enabling legislation is required to serve as a guide for the courts' attitude toward international commercial arbitration.

The concept of economic interdependence gave rise to the globalisation of most national economies. This in turn resulted in a dramatic increase in transnational commerce

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[1] Thomas E. Carbonneau, "Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce" (1984) 19 Texas International Law Journal 33 at 61.

especially after the end of the Second World War as nations came to realise the benefits of free and open trading systems and the need to foster closer relations through economic cooperation. This subsequent economic expansion provided an international dimension to legal relations in international contracts.[2] These factors were responsible for the concomitant increase in international commercial disputes. Thus, the need for a prompt and an effective framework for the resolution of these disputes has become imperative for the continued orderly expansion and viability of international commercial transactions.

The wish of the actors in international business is for a process based on universally accepted principles in order to conclude contracts and to resolve the difficulties of execution.[3] This desire, *inter alia,* made arbitration preferable to litigation.[4] Today, commercial arbitration has been widely accepted as machinery for settlement of international commercial disputes arising out of an international business contract.[5] An appreciable number of international contracts include an arbitration clause or refer to an arbitration agreement

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[2] See Rene David, *Arbitration in International Trade* (Deventer: Kluwer Law and Taxation Publishers, 1985) at 131. He identified some implications of international contract relations to include the following factors: that the parties may be nationals of or domiciled in different countries, goods may have to be delivered in a country other than the one where they are located at the time of the contract, payment for the goods may involve a transfer of funds from one country to another, foreign laws may apply to the contract and arbitration proceedings etc.

[3] Michael Gaudet, "Overcoming Regional Differences" (1988) 5 Journal of International Arbitration 67 at 78.

[4] For other advantages of arbitration, see Janice E. Meason and Allison Smith, "Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench" (1991) 12 Northwestern Journal of International Law & Business 24 at 27-28, where they opined that "advocates within the business community believe that arbitration is preferable over litigation because arbitration is thought to be informal, faster, less costly, equitable, a way to avoid unfavourable publicity, relatively conciliatory, absorbs less management time ... Most importantly, arbitration is seen as providing the best chance to save the underlying business relationship".

[5] Linda C. Reif, "Recent Developments in International Economic and Business Law (1991) 2 (Papers presented at Mid-Winter Meeting Canadian Bar Association, Alberta Branch) 805 at 850.

between the parties.[6] This development prompted The Honourable Mr. Justice Kerr to observe that:

> since it is part of the duty of any *competent lawyer* to provide in advance for the means of resolving disputes in [international contracts], an arbitration clause is the obvious solution.[7]

Although domestic law remains relevant to contractual relationships, an arbitration which takes place pursuant to a contract which presents some international features calls for the application of a multinational instrument. However, because arbitration is not self-executory, reliance on national courts is also necessary to secure compliance with arbitration agreements and arbitral awards.[8] But the disparities between and peculiarities of national laws give rise to different state practices and attitudes towards recognition and enforcement of arbitral awards.

This situation does not augur well for international commercial arbitration. Thus, there is a need for international instruments to provide uniform rules of recognition and enforcement of international commercial arbitration agreements and arbitral awards. Such a convention should provide:

> a procedure whereby states have been brought to agree on a number of rules concerning arbitral agreements, procedures and awards, and to undertake, if such rules have been observed, to give effect to submissions

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[6] International organisations such as the United nations and the European Space Agency regularly include arbitration clauses in their commercial contracts with private enterprises. See Karl-Heinz Bockstiegel, "Some Major Changes in International Arbitration: The Past, the Perspective" (1999) 65 Journal of the Chartered Institute of Arbitrators 244 at 245.

[7] Michael Kerr, "International Arbitration V. Litigation" (1980) Journal of Business Law 164 at 166. (emphasis mine).

[8] See Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell,1986) at 340 where the learned authors observed that the power of enforcement forms part of the prerogative of state powers which the state is not likely to confer upon a private arbitral tribunal.

> to arbitration and to enforce awards in their territories, subject to a control the extent and modalities of which have also been determined by international conventions.[9]

This objective led to the evolution of transnational treaties and instruments on international commercial arbitration. The historical development of such treaties and instruments is undertaken in this chapter essentially for two reasons. First, it will explain the origin of some conditions and terminology in international commercial arbitration that were introduced by the early treaties and retained by subsequent agreements.[10] Second, my discussion will provide the basis for an empirical analysis of the level of success achieved in dismembering the obstacles to recognition and enforcement of international commercial arbitral awards that forms the central focus of this thesis.

2.2. THE GENEVA TREATIES

As has been noted, the critical issue which has been of historical concern to the international community is the enforcement of arbitral awards. International efforts to overcome obstacles to recognition and enforcement date back to the *Montevideo Treaty on International Procedural Law of 1889*.[11] The treaty provided for recognition and enforcement of arbitration agreements between certain Latin American states.[12] This treaty, as well as the

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[9] Rene David, *supra* note 2 at 138.

[10] Notably, the "reservation provisions" and the "non arbitrability" and "public policy" defences to recognition and enforcement of arbitral awards.

[11] *Treaty Concerning the Union of South American States in Respect of Procedural Law*, 11 January 1889, 9 O.A.S.T.S. The treaty is published in an English translation, in 2 Register of Texts of Conventions and other Instruments Concerning International Trade Law (1973) 2 United Nations 5 (hereinafter Register of Texts).

[12] Montevideo Treaty, *supra* note 11, Articles 5-7. The treaty was signed by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay. See Frank E. Nattier, "International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements and Awards" (1985-86) 21 Texas International Law Journal 397 at 400.

second Montevideo Treaty[13] and indeed others that followed, were essentially born out of a regional convention.[14]

The first two international conventions on arbitration were conducted under the aegis of the League of Nations. These were the *Geneva Protocol on Arbitration Clauses of 1923*[15] and the complementary *Geneva Convention on the Execution of Foreign Arbitral Awards of 1927*[16] (hereinafter jointly referred to as the Geneva Treaties). The Geneva treaties were a result of concerted efforts between the International Chamber of Commerce (ICC)[17] and the League of Nations. At the end of the First World War, the ICC revived the proposal[18] for a conference of experts to collect and consider all data relative to the practical application of the principle of arbitration between all citizens of different countries for the purpose of drafting "an international convention for the unification of laws on arbitration."[19] This led to the 1923 Geneva Protocol and, at its Second Congress in March 1923 in Rome (while the

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[13] *Montevideo Treaty on International Procedural Law*, 19 March 1940, 9 O.A.S.T.S. Translated excerpt in 2 Register of Texts, *supra* note 11 at 21. This Treaty was ratified by Argentina, Paraguay, and Uruguay and remained in force in those states. See Frank E. Nattier, *supra* note 12 at 400.

[14] Redfern & Hunter, *supra* note 8 at 44.

[15] 27 L.N.T.S. 158 (in force July 28, 1924) (hereinafter Geneva Protocol).

[16] 92 L.N.T.S. 301 (in force July 25, 1929) (hereinafter Geneva Convention).

[17] The International Chamber of Commerce is an arbitral institution set up in 1922 and based in Paris. The International Court of Arbitration of the International Chamber of Commerce, established in 1923, serves as a centre for arbitration proceedings.

[18] The proposal was initiated in June 1914 in Paris by the International Congress of Chambers of Commerce and Commercial and Industrial Association which adopted a resolution proposing the unification of national legislation relating to commercial arbitration. The proposal was cut short by the outbreak of the First World War. See V.V. Veeder QC, "Two Arbitral Butterflies: Bramwell and David" in Martin Hunter, Arthur Marriot & V.V. Veeder, eds., *The Internationalization of International Arbitration* (London: Graham & Trotman/Martinus Nijhoff, 1993) at 17.

[19] V.V. Veeder, *supra* note 18 at 17.

draft of the Geneva Protocol was being considered by the League of Nations), the ICC also promoted a further proposal for better means for enforcing arbitration awards which resulted in the 1927 Geneva Convention.[20] These efforts represent the inception of a multinational attempt to unify and liberalise international commercial arbitration.[21]

2.2.a. THE GENEVA PROTOCOL OF 1923

The primary objective of the 1923 Geneva Protocol[22] was to secure the international enforcement of arbitration agreements.[23] Thus, if parties to whom the Protocol applied agreed in a contract to go to arbitration, the courts of the contracting parties, when presented with a dispute within the scope of the arbitration clause, were obliged to refer the parties to arbitration. In this respect, the Protocol expressly obliged ratifying states to recognise:

> the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is

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[20] Geneva Convention, *supra* note 16.

[21] Jane L. Volz & Roger S. Haydock, "Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser" (1996) 21 William Mitchell Law Review 867 at 874.

[22] The Protocol was ratified by Albania, Austria, Brazil, Czechoslovakia (now the Czech Republic), Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, India, Italy, Luxembourg, Monaco, New Zealand, Norway, Poland, Portugal, Romania, Sweden, Switzerland, and Spain. Also Japan, Belgium, and the Netherlands extended their acceptance of the Protocol to their overseas dependencies. See Arthur Nussbaum, "Treaties on Commercial Arbitration - A Test of International Private-Law Legislation" (1942) 56 Harvard Law Review 219 at 221. See also Redfern & Hunter, *supra* note 8 at 342.

[23] See Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Deventer: Kluwer Law and Taxation Publishers, 1981) at 6.

subject.[24]

In addition, the Geneva Protocol obliged contracting parties to ensure the execution of arbitral awards made in their own territories.[25] It equally provided that a state is free to apply entirely its law when enforcing arbitral awards. The Geneva Protocol also stated that the arbitral procedure, including the constitution of the arbitral tribunal, shall be "governed by the will of the parties and by the law of the country in whose territory the arbitration takes place."[26]

The Geneva Protocol, as the first multilateral treaty on international commercial arbitration, expectedly, was limited in scope and effect. The Protocol applied to arbitration clauses between parties that are "subject respectively to the jurisdiction of different Contracting States."[27] The meaning of this phrase constituted a problem of interpretation with some courts taking it to be a requirement of nationality, whilst others held the view that it referred to the requirement of residence, domicile or usual place of business.[28]

Other inherent defects of the Geneva Protocol were uncertainties over the definitions of words such as "commercial matter," "existing and future differences" and "disputes capable of settlement by arbitration."[29] In order to ascertain the meaning of these words, it is

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[24] Geneva Protocol, *supra* note 15, Article 1.

[25] *Ibid.*, Article 3.

[26] *Ibid.*, Article 2.

[27] *Ibid.*, Article 1.

[28] See Redfern & Hunter, *supra* note 8 at 342.

[29] *Ibid.*

necessary to look closely at the law of the state concerned to see what definition it adopts on each of the terms. Regrettably, contracting states adopted different interpretations of these phrases which limited the effect of the Protocol.[30]

Furthermore, the Protocol limited the duty of contracting states to recognise arbitral awards made only in their territory.[31] By illustration, where an arbitral award is made in another contracting state between parties to an arbitration agreement who are nationals of states that have ratified the Protocol, a contracting party where the award is sought to be enforced is not bound to recognise such arbitral award made in the territory of another contracting state. Thus, there was no guarantee that the successful party could enforce an arbitral award beyond the state where the award was made.[32] To this extent, the impact of the Geneva Protocol on enforceability of international awards was minimal as this provision undermined the rationale behind the Protocol.[33] These limitations notwithstanding, the Geneva Protocol is considered to have been a necessary first step towards international recognition and enforcement of international arbitration agreements and awards.[34]

2.2.b. THE GENEVA CONVENTION OF 1927

The major shortcoming of the Geneva Protocol was that it lacked the capacity of

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[30] Redfern & Hunter, *supra* note 8 at 15.

[31] Article 3 of the Protocol only guarantee the enforcement of awards made in their country of origin, but does not ensure recognition in any one country of awards rendered in the territory of another contracting state.

[32] Redfern & Hunter, *supra* note 8 at 342.

[33] See Redfern & Hunter, *ibid.*, Albert van den Berg, *supra* note 23 at 7.

[34] Redfern & Hunter, *ibid.*, at 342.

international enforcement. The Economic Commission of the League of Nations brought this defect to the attention of the Council of the League.[35] In order to fill in this gap, the *Convention on the Execution of Foreign Awards* was adopted by the League of Nations in 1927[36] and opened for signature by states bound by the Protocol.[37]

The Geneva Convention partially addressed the limited scope of the Geneva Protocol. It ensured recognition and enforcement of arbitral awards in the territory of any of the contracting parties. Under this Convention, for an award to be recognised it had to satisfy certain requirements. First, because the Convention purported to complement the Protocol, it only applied to awards that had been made pursuant to an arbitration agreement covered under the Protocol. Second, and of particular significance, is that the award had to be "final" in the country of origin. In this respect, the Convention provided that:

> to obtain such recognition or enforcement, it shall, further, be necessary:
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> (d) that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appeal or .... if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.[38]

This requirement was generally interpreted to mean that an award is final if the party applying for enforcement of the award has obtained leave for enforcement by way of an

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[35] See Rene David, *supra* note 2 at 144.

[36] The Geneva Convention, *supra* note 16.

[37] The signatories to the Geneva Convention were same as those who ratified the Geneva Protocol with the addition of Burma, Kenya, and Zambia but Brazil, Norway and Poland who were signatories to the Geneva Protocol, failed to sign the Geneva Convention. See Redfern & Hunter, *supra* note 8 at 343.

[38] Geneva Convention, *supra* note 16, Article 1 (d).

exequatur[39] in the country where the award was made. In addition, the party also had to obtain an *exequatur* in the country where it intended to enforce the award, resulting in a requirement for double *exequatur*.

Also, under the Geneva Convention, the burden of proof that the award has become final was also placed on the party seeking to enforce the award.[40] Thus, the losing party had the opportunity of attacking the award in its country of origin so as to prevent its registration in any other country. Alternatively, where the country of origin issued an *exequatur*, the losing party needed only to file "shotgun" objections in the enforcing country to make the burden of proving the finality of the award virtually impossible.[41]

It has been argued that the requirement of "finality" was because of concerns that "the award should not be given binding effect in one country when it is not binding under the law where it was made."[42] However, the effect was that in practice the application of this provision increased attacks against awards, which certainly was contrary to the intention of the Convention.[43] Also, the Geneva Convention required only the enforcement of awards not contrary to the public policy or to the principles of laws of the country in which it was sought to be relied upon.[44] This and other additional requirements contained in the Geneva

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[39] An *exequatur* is a court order which authorises the execution of the award within the territory of the state.

[40] Geneva Convention, *supra* note 16, Article 4.

[41] Frank E. Nattier, *supra* note 12 at 401.

[42] Ramona Martinez, "Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The Refusal Provisions" (1990) 24 International Lawyer 487 at 504.

[43] Mauro Rubino-Sammartano, *International Arbitration Law* (Deventer: Kluwer Law and Taxation Publishers, 1990) at 30.

[44] Geneva Convention, *supra* note 16, Article 1(e).

Convention generally hindered the enforcement of arbitral awards.[45]

2.2.c. AN ASSESSMENT OF THE GENEVA TREATIES

The first thing to note is that from whatever viewpoint the Geneva treaties are assessed, they represent one of the accomplishments of the League of Nations in assisting in the development of international trade. The treaties were also the first step towards internationalisation of legislation on recognition and enforcement of arbitration agreements and arbitral awards. In terms of success, the Geneva treaties achieved modest progress.[46] Also, it is remarkable that:

> at a very early stage, far in advance of any similar developments in respect of judgments, states accepted the desirability of recognition and enforcement of foreign arbitral awards. They were brief documents recognising without many conditions the international effect of both arbitration agreements and arbitral awards.[47]

However, the inherent shortcomings of the Geneva Protocol of 1923 and the Geneva Convention of 1927 were no doubt of significant hindrance to the very purpose which informed the adoption of the treaties. This has been attributed, *inter alia*, to the handicaps

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[45] See Article 2 of the Geneva Convention which provides that in order to establish the validity of an award, the following additional conditions must be proved: (a) the award must not have been annulled in the forum of award; (b) the parties must have received due notice and representation; (c) the arbitration must have dealt with differences contemplated by the parties; and (d) it must have settled all such differences. If these condition were not met, conditional acceptance or postponement of either recognition or enforcement was however permitted.

[46] For example, Switzerland changed its arbitration laws following its ratification of the treaties, while countries like Belgium, England, India, Italy, the Netherlands, Estonia, and Greece transformed the treaties into internal law by enacting implementing legislation. France, Poland, and Sweden also incorporated the principles of the treaties into their general law. See Arthur Nussbaum, *supra* note 22 at 223.

[47] Allan Philip, "A Century of Internationalisation of International Arbitration: An Overview" in *The Internationalization of International Arbitration*, *supra* note 18 at 26-27.

imposed on the work of the League by the political situation of that period.[48] Thus, it has been observed that:

> the Geneva treaties have not produced the widespread international enforcement of arbitration agreements and awards which was expected of them. The primary blame for this failure appears to lie with the structure of the treaties themselves. By effectively placing the burden of proof on every issue upon the successful party, the treaties have eased the path of the defaulting defendant and the partial tribunal. An additional criticism of the treaties has been levelled at the diversity-of-citizenship requirement; the treaties apply to differences between parties "subject respectively to the jurisdiction of different Contracting States." The uncertainty engendered by this limitation is compounded by the varying national theories concerning the element of nationality.[49]

Other factors which contributed to the shortcomings of the treaties were the exclusion, in the discretion of each government, of noncommercial matters, and the discretion to deny the enforcement of arbitral awards on the broad ground of "public policy". The overall effect of these factors is that despite the very considerable effort and skill that went into the preparation and negotiation of all of the conventions, they did not achieve any perceptible progress in ensuring enforcement of arbitral clauses or recognition and enforcement of foreign arbitral awards.[50] The Geneva treaties presently are largely of historical relevance only,[51] but their examination is necessary because some of the concepts

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[48] Arthur Nussbaum, *supra* note 22 at 235.

[49] Leonard V. Quigley, "Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1960-61) 70 Yale Law Journal 1049 at 1055.

[50] Frank. E. Nattier, *supra* note 12 at 401.

[51] The Geneva treaties were repealed by the New York Convention, *infra* note 62, Article VII (2). They have also been overtaken by events as most of the Contracting States to the Geneva treaties have become signatories to the New York Convention.

which are retained in modern international arbitration agreements originated in the treaties.[52]

THE NEW YORK CONVENTION OF 1958

2.3.a. INTRODUCTION

The unsatisfactory performance of the Geneva treaties and the increase in international trade after the end of the Second World War led to a fresh attempt to conclude another multilateral convention to provide solutions to the problem of enforcing international arbitral awards.[53]

The following statement credited to a representative of the Netherlands to the United Nations Economic and Social Council, New York Conference, 1958, is indicative of the desire of most nations to conclude a treaty.

> An international arrangement in the form of a convention under which parties to international commercial transactions would be assured of the maximum protection of their interests in a foreign country would undoubtedly be of a great value to the development of international trade.[54]

The International Chamber of Commerce took the initiative at its 1951 Lisbon Congress where it noted that the Geneva treaties no longer met modern economic requirements. Accordingly, the ICC Congress appointed a Committee on International Commercial Arbitration and, in 1953, the Committee submitted a draft convention to the United Nations Economic and Social Council (hereinafter ECOSOC) requesting the United

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[52] Some of these concepts include the "reservation clause", and public policy" and "non-abitrability" exceptions.

[53] Leonard V. Quigley, *supra* note 49 at 1059.

[54] See Allen Sultan, "The United Nations Arbitration Convention and United States Policy" (1959) 53 American Journal of International Law 807 at 813.

Nations to conclude a convention on international commercial arbitration.[55] The ICC appreciated the fact that a commercial agreement will always be associated with a given national system of laws. It also noted that awards settling a dispute arising from such agreement will necessarily involve different countries, making it imperative that arbitral awards should be enforced in all these countries in the same way.[56] The ICC argued that the development of international trade depended on the uniform enforcement of arbitral awards.[57] It therefore called on the United Nations to adopt the draft convention with a view that:

> the adoption of such a convention would greatly increase the efficiency of international commercial arbitration, by insuring a rapid enforcement of arbitral awards rendered in accordance with the will of the parties.[58]

On April 6, 1954, ECOSOC set up an ad hoc Committee known as the Committee on the Enforcement of International Arbitral Awards to study the ICC proposed convention. In May 1955, the Committee produced a new draft convention of its own, different from the ICC draft which it considered too ambitious.[59] The Committee draft was forwarded to various United Nations member states and nongovernmental organisations for observations

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[55] Leonard V. Quigley, *supra* note 49 at 1059.

[56] Allen Sultan, *supra* note 54 at 812.

[57] *Ibid.*

[58] See The International Chamber of Commerce Report and Preliminary Draft Convention titled "Enforcement of International Arbitral Awards" in *U.N. Doc. E/C.2/373.* See also Allen Sultan, *ibid.*, at 812.

[59] The remarkable difference between the ICC draft Convention and the ECOSOC Committee's draft is in the change of the title of the draft convention to "Foreign Arbitral Awards" as against the ICC title of "International Arbitral Awards". See Albert van den Berg, *supra* note 23 at 7-8.

and comments.[60] On receipt of the final draft, ECOSOC convened a conference for the conclusion of a convention on the recognition and enforcement of foreign arbitral awards.

The conference was held from May 20 to June 10, 1958 and was attended by representatives of forty-eight states and thirteen nongovernmental organisations.[61] At the end of the Conference, on June 10, 1958, the Conference adopted the Committee's draft as the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[62] (hereinafter the New York Convention). Between June 10, 1958 and December 31, 1958 (the period within which the New York Convention was open for signature), 23 nations signed the Convention.[63] Presently, about 121 countries have signed or acceded to the Convention.[64]

2.3.b. THE NEW YORK CONVENTION OF 1958 AND THE GENEVA TREATIES

It is instructive to note that much of what is contained in the New York Convention may already be found in the Geneva Treaties. The Convention is, however, a more refined document.[65] Also, from inception, the intention of ECOSOC was that the New York

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[60] Significantly, the United States, Canada and the Union of South Africa (as it then was), indicated their unwillingness to participate in a conference if one was called. Though the United States eventually sent representatives, it did not sign the Convention until 1970. Also, Canada was unable to sign the Convention until 1986. See Allen Sultan, *supra* note 54 at 814.

[61] See Leonard V. Quigley, *supra* note 49 at 1059-1060.

[62] UN. Doc. E/CONF. 26/9/Rev. 1, reprinted in 330 United Nations Treaty Series 38 (in force June 7, 1959).

[63] The nations included Argentina, Belgium, Bulgaria, Byelorussian S.S.R., Costa Rica, Ceylon, Czechoslovakia (now Czech Republic), Ecuador, El Salvador. Others are the Federal Republic of Germany, Finland, Luxembourg, India, Israel, Jordan, Netherlands, Pakistan, Philippines, Poland, Sweden, Switzerland, Ukrainian S.S.R., and U.S.S.R. See Martin Domke, "Notes on the United Nations Conference on International Commercial Arbitration" (1959) 53 American Journal of International Law 414 at 415.

[64] See UNCITRAL Website <http.//www.un.or.at/uncitral.en-index.htm> (accessed on October 25, 1999).

[65] Allan Philip, *supra* note 47 at 27.

Convention would replace the Geneva treaties.[66] Thus, the Convention was destined to make remarkable improvements to the Geneva treaties. In order to achieve this objective, the New York Convention made bold attempts to enhance the practice of arbitration and establish a degree of unification in state practice with respect to the recognition and enforcement of arbitration agreements and awards.[67]

Although the New York Convention will be discussed in detail in Chapter 3, a brief overview will be provided. Significantly, the Convention has a wider application than the Geneva treaties.[68] First, it dropped the requirement that the foreign award must have been made in the territory of another contracting state.[69] Second, the Convention imposes a stronger obligation on contracting states to recognise arbitral awards covered by the Convention and does not require the parties to be nationals of different contracting states.[70]

Another remarkable departure from the Geneva treaties is that under the New York Convention the requirements for obtaining recognition and enforcement of arbitral awards have been simplified.[71] Thus, it has narrowed the task of the party seeking enforcement of

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[66] New York Convention, *supra* note 62, Article VII(2) provides that the Geneva Protocol of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards shall cease to produce effects between the Contracting States on their becoming bound and to the extent they become bound by this Convention.

[67] Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Westport, Connecticut: Quorum Books, 1994) cited by Ranee K.L. Panjabi, "Economic Globalization: The Challenge for Arbitrators" (1995) 28 Vanderbilt Journal of International Law 173 at 175.

[68] See New York Convention, *supra* note 62, Article I.

[69] *Ibid.* Note however, that a state, when acceding to the Convention, may limit its application of the Convention to awards made in another contracting state. New York Convention, *ibid.*, Article 1(3).

[70] New York Convention, *supra* note 62, Article III.

[71] New York Convention, *ibid.*, Article IV provides that to obtain the recognition and enforcement of an arbitral award, the party applying for recognition shall supply: (a) the duly authenticated original award or a duly certified copy thereof and (b) the original arbitration agreement or a duly certified copy thereof.

the award by placing the burden of proving the existence of negative requirements on the party opposing the application.[72] The New York Convention also replaced the condition that the award must have been made "final" in the country of origin and provided instead that the award must be "binding" on the parties.[73] This resolved the problem of the "double *exequatur*" requirement on the party seeking enforcement of the award.

One criticism of the Geneva treaties is that under the Geneva Convention of 1927 arbitral agreements must be interpreted under the relevant law of the place where the enforcement of the arbitration agreement is sought. The effect is that arbitration agreements are subject to local conflict of laws rules.[74] In order to remedy this position, the New York Convention provided for internationally uniform rules[75] for the form and validity of arbitration agreements.[76] Under the New York Convention, contracting states are obliged to recognise such agreements by which the parties undertake to submit their disputes for arbitration.[77]

With the above changes introduced by the New York Convention, it is generally agreed that the Convention is a considerable improvement on the Geneva treaties.[78] Indeed, the advantages of the New York Convention over the Geneva treaties was identified by the

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[72] New York Convention, *supra* note 62, Article V(1).

[73] New York Convention, *ibid.*, Article III.

[74] Arthur Nussbaum, *supra* note 22 at 235.

[75] Albert van den Berg, *supra* note 23 at 9.

[76] New York Convention, *supra* note 62, Article II(2) provides that an arbitration agreement must be in writing which is defined as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

[77] New York Convention, *ibid.*, Article II.

[78] Redfern & Hunter, *supra* note 8 at 46.

President of the ECOSOC Conference who observed as follows:

> ... it was already apparent that the document represented an improvement on the Geneva Convention of 1927. It gave a wider definition of the awards to which the Convention applied; it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked; it gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedure; it gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security.[79]

2.3.c. LIMITATIONS OF THE NEW YORK CONVENTION

The political handicaps[80] occasioned by divergent state policies which impeded the work of the League of Nations with respect to its assignment on the Geneva treaties were also manifest during the ECOSOC Conference. These factors are responsible for the limitations of the New York Convention contained in Article I. Two general issues are addressed in Article I. The first is the scope of the Convention, which applies expressly to arbitral awards made in a state other than the state where the award is sought to be enforced. Second, the Convention applies to arbitral awards rendered in the enforcing state if that state does not consider the award as domestic.[81]

In order to give effect to the second proviso, the determining factor is the national law of the forum state rather than the parties' intentions. The implication is that where the parties have agreed to treat their relations as international, if the law of the forum does not regard

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[79] Comment credited to H. E. M.C.W.A. Schurmann. See U.N. Doc. E/CONF. 26/SR.25 at 2; Allen Sultan, *supra* note 54 at 816.

[80] Arthur Nussbaum, *supra* note 22 at 235.

[81] New York Convention, *supra* note 62, Article I(1).

their relations as such, the Convention will be inapplicable. By illustration, under German policy, an award rendered in accordance with German procedural law is regarded as a domestic (German) award.[82] If that award is rendered outside German territory, the first part of Article I of the New York Convention qualifies the award as a foreign award. However, where the award is rendered within German territory - most likely between a German national and a foreign national - the award will be regarded as domestic.

The second issue addressed by Article I is what is generally referred to as the "reservation clause."[83] Under this clause, states are permitted to make two reservations. First, a state may limit its obligation to recognise arbitral awards made only in the territory of another contracting state.[84] This reciprocity reservation when taken excludes awards rendered in a state that has not become a party to the New York Convention. By contrast, if this reservation is not made, the Convention also extends to awards made in a state which is not bound by the New York Convention. This is envisaged by Article I of the Convention which introduced an international dimension to the New York Convention beyond that of the Geneva treaties. However, that concept of universality has been considerably qualified by the option of reciprocity.[85]

The second reservation allows contracting states to limit their undertaking to disputes arising from legal relations, whether contractual or not, that are considered as commercial

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[82] See Leonard V. Quigley, *supra* note 49 at 1061.

[83] New York Convention, *supra* note 62, Article I(3).

[84] *Ibid.*

[85] Martin Domke, *supra* note 63 at 418.

under the national law of the state making the declaration.[86] This reservation has been described as an unqualified power conceded to contracting states to limit application of the Convention to commercial differences as determined by the state's forum law.[87] The clause was inserted at the insistence of Belgium which stated that it could not accede to the Convention without such reservation.[88] This is an example of where national laws of contracting states are taken into consideration to undermine the uniform application objective that the New York Convention set out to achieve.

The fact that there are no national laws which contain an exhaustive list of what is regarded by a state as commercial legal relations may pose surprises for parties to international arbitration agreements. The uncertainty concerning what falls within the definition makes it difficult to provide legal advice on this issue. This reservation has been criticised to the effect that:

> ...reference to legal relations regarded as commercial in the country where enforcement is sought is most unfortunate. The concept of 'commercial matters' may be understood in many ways and it is to be deplored that a suggestion made .... on the ECOSOC draft was not followed; this would have required States making use of the reservation to make clear what a commercial matter is according to their national laws. ... On the other hand, the concept of commerce is interpreted in diverse ways, and especially it is not understood in the same way when domestic and international commerce are involved.[89]

The commercial reservation is a carry over from the Geneva Convention of 1927 and

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[86] New York Convention, *supra* note 62, Article I(3).

[87] See Leonard V. Quigley, *supra* note 49 at 1062.

[88] *Ibid.*

[89] See Rene David, *supra* note 2 at 149.

a further indication of the lack of political will by contracting states to completely isolate international arbitration from national laws. These limitations notwithstanding, the New York Convention is easily the most well-known treaty, and the one to date having the greatest impact on the growth of international commercial arbitration.[90] Indeed, the New York Convention is, in the field of trade law:

> the most successful international convention ever concluded, if success is to be measured by the number of states adhering to it. It is a remarkable achievement. ...When we discuss the internationalization of arbitration the New York Convention is certainly one of the most important factors in this process.[91]

2.4. THE UNCITRAL MODEL LAW

2.4.a. INTRODUCTION

As has been noted, the New York Convention forms the foundation for the recognition and enforcement of foreign arbitral awards. Though an appreciable number of states have adhered to the Convention, recognition and enforcement of arbitral awards is still hampered in those states that have not adhered to the Convention and in states that do not have a modern law on international commercial arbitration. In addition, a review of court decisions on the Convention up to 1979 indicated that enforcement of arbitral awards had not been uniform.[92]

On the contrary, the significance of the New York Convention for international

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[90] D. R. Haigh Q. C., A. K. Kunetski & C. M. Anthony, "International Commercial Arbitration and the Canadian Experience" (1995) 34 Alberta Law Review 137 at 140.

[91] Allan Philip, *supra* note 47 at 28.

[92] See Pieter Sanders, "Consolidated Commentary" in Pieter Sanders, ed., *Yearbook Commercial Arbitration*, Vol. IV (Deventer: Kluwer Law & Taxation Publishers, 1979) at 231.

commercial arbitration makes it important that the Convention is uniformly applied by the courts of contracting states.[93] This prompted the Asian-African Legal Consultative Committee (AALCC) in 1976 to request the United Nations Commission on International Trade Law (UNCITRAL) to consider the possibility of a revision or amendment to the New York Convention in the form of a protocol. As a result of the suggestion, the UNCITRAL Secretary-General was mandated to carry out a study of the application and interpretations of the New York Convention. In his report, he noted that the New York Convention had satisfactorily met the general purpose for which it was adopted and that it would be inadvisable to amend its provisions.[94] However, he observed that there were disparities in the application of some provisions of the Convention, but opined that:

> harmonization of the enforcement practices of states, and the judicial control of arbitral procedure, could be achieved more effectively by the promulgation of a model or uniform law .... [A] model law was more likely to lead to realistic degree of harmonization in practice than the less flexible approach of a convention or uniform law.[95]

UNCITRAL agreed with the Report of the Secretary-General and noted that any modification or amendment of the Convention might have a harmful effect in that it could cause confusion and impede further accessions to or ratifications of the Convention. Furthermore, UNCITRAL was of the view that a model law would be a more ideal way to reduce the divergencies encountered in the interpretation of the New York Convention and

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[93] Albert van den Berg, *supra* note 23 at 1.

[94] See UNCITRAL Secretary-General Report: *Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. A/CN.9/168, para. 308.

[95] *Ibid.* See also Redfern & Hunter, *supra* note 8 at 387-88.

eliminate the disparity of national arbitration laws among contracting states.[96]

Following the acceptance of the proposal for a model law, UNCITRAL requested the Secretary-General to carry out a comprehensive review of the problems associated with the application of the New York Convention and identify the issues to be dealt with. At the conclusion of his assignment, the Secretary-General submitted his report to UNCITRAL.[97] The report formed the basis of UNCITRAL policy objectives for the proposed model law, which included:

i. the liberalization of international commercial arbitration by limiting the role of national courts, and by giving effect to the doctrine of "autonomy of the will," allowing the parties freedom to choose how their disputes should be determined;
ii. the establishment of a certain defined core of mandatory provisions to ensure fairness and due process;
iii. the provision of a framework for the conduct of international commercial arbitrations, so that in the event of the parties being unable to agree on procedural matters the arbitration would nevertheless be capable of being completed; and
iv. the establishment of other provisions to aid the enforceability of awards and to clarify certain controversial practical issues.[98]

The UNCITRAL Working Group on International Contract Practices (hereinafter Working Group) was charged with the responsibility of preparing the proposed model law on international commercial arbitration. With comments from United Nations member states

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[96] The Report indicated that some national laws restrict the power of the parties to determine the applicable law, or do not recognise the competence of the arbitral tribunal to decide about its own jurisdiction, or they provide for judicial control over the composition of the tribunal and sometimes even over the application of substantive law. Other laws establish certain nationality requirements for the arbitrators or require the award to be accompanied by a statement of reasons irrespective of any agreement by the parties to the contrary. See Kenneth T. Ungar, "The Enforcement of Arbitral Awards Under the UNCITRAL Model Law on International Commercial Arbitration" (1987) 25 Columbia Journal of Transnational Law 717 at 728.

[97] *Possible Features of a Model Law on International Commercial Arbitration*, U.N. Doc. A/CN.9/207. See also Redfern & Hunter, *supra* note 8 at 388.

[98] UNCITRAL Secretary-General Report, *ibid.*, at paras. 16-27.

and international arbitral organisations, the Working Group produced a final draft text of the model law. This text was adopted by UNCITRAL on June 21, 1985 as *the UNCITRAL Model Law on International Commercial Arbitration*[99] (hereinafter UNCITRAL Model Law or the Model Law). The drafting of the Model Law involved extensive consultations, with contributions from many nations and non-governmental organisations,[100] such that it has been observed that:

> In preparing the Model Law, UNCITRAL has in effect held a four year continuing conference, pooling the best brains in the field from North, South, East and West. As a result it has produced a compromise solution to the classical problems that arise in arbitration procedures, combined with a quite exceptional record of its discussions in the working papers. I say therefore that it would be madness now for any country considering adopting new legislation for regulating arbitration to ignore what has been done, together with the work behind it, before implementing a solution of its own.[101]

By successfully completing the Model Law, UNCITRAL further complemented its earlier effort in adopting the *UNCITRAL Rules of Arbitration, 1976*[102] which are aimed at streamlining the arbitration process. By 1999, the UNCITRAL Model Law has started to have an impact as about twenty-eight countries have adopted national arbitration laws based

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[99] *The UNCITRAL Model Law on International Commercial Arbitration* (the Model Law), UN. Doc. A/40/17 (1985), reprinted in (1985) 24 I.L.M. 1302.

[100] See Michael F. Hoellering, "The UNCITRAL Model Law on International Commercial Arbitration" (1986) 20 International Lawyer 327 at 328 where he noted that about twenty-two states and five international organisations submitted initial comments on the draft text. See also Daniel M. Kolkey, "It's Time to Adopt the UNCITRAL Model Law on International Commercial Arbitration" (1998) 8 Transnational Law and Contemporary Problems 3 at 5 where he opined that the Model Law is as a result of efforts of representatives from fifty-eight states, aided by representatives of eighteen international organisations.

[101] John Saxby, "A User's Perspective of the UNCITRAL Model Law" (1986) 2 Arbitration International 164 at 165-66.

[102] U.N. Doc. A/CN.9/SER.A/1976.

on the Model Law provisions.[103] In addition, eight states within the United States of America[104] and Scotland[105] within the United Kingdom have similarly adopted national arbitration laws based on the UNCITRAL Model Law.

2.4.b. THE NEW YORK CONVENTION AND THE MODEL LAW

The intention of UNCITRAL is that the Model Law should serve as a means to further the objectives of the New York Convention. This fact is evident from the near verbatim recitation of analogous provisions of the Convention in the Model Law. Noticeable differences were made for the sake of clarification or to adjust the Model Law to non-foreign awards.[106] This view is supported by UNCITRAL's unwillingness to amend the New York Convention. This is due to the fact that the problem in the application of the New York Convention is not a result of defects in the Convention but because of the vagaries of national legal systems.[107] Nevertheless, it is this disparity in application that informed the need for unification, or at least for harmonisation, which is intended by the UNCITRAL Model Law.

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[103] The countries include Australia, Bahrain, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Germany, Guatemala, Hong Kong Special Administrative Region, Hungary, India, Iran (Islamic Republic of), Ireland, Kenya, Lithuania, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Russian Federation, Singapore, SriLanka, Tunisia, Ukraine, and Zimbabwe.

[104] California, Connecticut, Florida, Georgia, North Carolina, Ohio, Oregon, and Texas. See Daniel M. Kolkey, *supra* note 100 at 13. See also, Robert K. Paterson, "Forging a New Judicial Attitude to International Commercial Arbitration in Canada; the UNCITRAL Model Law in Canadian Courts" (a Paper delivered at a *Seminar on the Canadian Experience of Alternative Dispute Resolution*, by the Korean Academy of Arbitration and Korean Association of Canadian Studies Seoul, Korea, November 29, 1997) at 1.

[105] For notes 103 - 104 see generally UNCITRAL Website *supra* note 64.

[106] See Note by the UNCITRAL Secretariat titled "Model Law on International Commercial Arbitration: Draft Articles 37 to 41 on Recognition and Enforcement of Awards and Recourse Against Awards" (1983) 14 UNCITRAL Year Book 91.

[107] John Saxby, *supra* note 101 at 165.

Whilst a detailed overview of the New York Convention and the UNCITRAL Model Law is contained in Chapter 3 below, it can be briefly noted that the essential differences between the New York Convention and the Model Law concern scope and contents. The New York Convention expressly covers only foreign arbitral awards.[108] It has as its central focus the facilitation and unification of standards by which international arbitration agreements and awards are observed and enforced by national courts of signatory states. In contrast, the Model Law expressly includes international awards and domestic awards rendered in international commercial arbitrations.[109] It also contains procedural laws governing the general conduct of international commercial arbitrations.

Under the New York Convention, to determine whether an award is a "foreign" arbitral award emphasis is on the place of arbitration, while the Model Law emphasises the nature of the award. Thus, an arbitral award from an international arbitration under the Model Law is regarded as an international award notwithstanding that it was made in the state where it is sought to be enforced.[110] With this approach, the Model Law has reduced the relevance of the place of arbitration. Taking into consideration the harmonisation objective of the Model Law:

> it is sound policy that the Model Law treats all awards alike irrespective of their place of origin and replaces traditional territorial lines of demarcation by a less artificial and more substantive criterion, namely whether the

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[108] New York Convention, *supra* note 62, Article I(1).

[109] Model Law, *supra* note 99, Article 1(1).

[110] Model Law, *ibid.*, Article 1(3)(c) extends this to a situation where the parties have expressly provided that the subject matter involves more than one country.

award is rendered in "international" arbitration.[111]

This has been described as a major landmark in the development of arbitration, comparable with the abolition of the double-*exequatur* requirement achieved by the 1958 New York Convention.[112] Reducing the relevance of the place of arbitration widens the choice and enhances the validity of international commercial arbitration. To this extent, the Model Law sought to provide a uniform treatment of all arbitral awards irrespective of their country of origin [113]

Furthermore, the Model Law does not oblige states, as would be the case under a multilateral convention such as the New York Convention, to incorporate the Model Law word for word in their domestic legal systems. In fact, its attractiveness is based on the flexibility it affords states to depart from it to the extent they consider necessary to accommodate important elements of their national law or policy which would otherwise be in conflict with it.

However, the implication of this approach is that knowledge that a state has adopted the Model Law should not lead to the belief that the relevant domestic legislation is a replica of the Model Law. Therefore, the domestic "model law" has to be checked to determine to what extent it conforms to or differs from the Model Law. In particular, although the Model Law abandoned the reciprocity reservation contained in the New York Convention, the

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[111] Martin Hunter, "The UNCITRAL Model Law" (1985) 13 International Business Lawyer 399 at 402.

[112] Gerold Herrmann, "The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions" in Peter Sarcevic, ed., *Essays on International Commercial Arbitration* (London: Graham & Trotman/Martinus Nijhoff, 1989) 1 at 16.

[113] Kenneth T. Ungar, *supra* note 96 at 731.

possibility that the national law may provide for restricted recognition and enforcement of arbitral awards cannot be ruled out. However, the wisdom in deleting the reciprocity clause in the Model Law is one of substance, based on an "attempt by its drafters to rapidly crystallize into custom the practice of enforcing awards rendered pursuant to a validly made agreement to arbitrate."[114]

2.5 COMMENTARY ON TRANSNATIONAL ARBITRATION CONVENTIONS AND INSTRUMENTS

The development of international conventions on arbitration as indicated above witnessed the active role of arbitration institutions, non-governmental organisations, and states under an umbrella organisation such as the League of Nations and the United Nations. The initial hindrance to international commercial arbitration is the need to uphold the intentions of the parties to submit their disputes for arbitration. The Geneva Protocol of 1923 basically set out to address this issue, paying little attention to recognition of arbitral awards. Although the Geneva Convention of 1927 was to focus on the issue of recognition of arbitral awards, it contained provisions which narrowed its effect as a means of achieveing enforcement of awards.

Undoubtedly, the most important feature of an international commercial arbitration award is that it should be transportable.[115] This means that the award should be capable of being recognised and enforced in as many states as possible. Thus, the need to secure a

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[114] Michael Durgavich, "Resolving Disputes Arising out of the Persian Gulf War: Independent Enforceability of International Agreements to Arbitrate" (1991-92) 22 California Western International Law Journal 389 at 404 (footnote 112).

[115] Redfern & Hunter, *supra* note 8 at 341.

considerable degree of uniformity in the recognition and enforcement of arbitral awards, necessarily engages the attention of most trading countries of the world.[116] This led to the adoption of the New York Convention in 1958. It was, therefore, not surprising that the Convention laid emphasis on this aspect of commercial arbitration.

The New York Convention achieved considerable success both in terms of the number of states that have acceded to the Convention and the comparative ease with which arbitral awards are being enforced in various contracting states. However, the urge for harmonisation of arbitral procedures and states' recognition and enforcement practices further led to the adoption of the Model Law by UNCITRAL in 1985.

The idea of a model law was compelling considering that, at the material time, some member nations of the United Nations were reluctant to accede to or ratify the New York Convention. The reluctance was accentuated by political reasons rather than a dissatisfaction with the New York Convention.[117] Also, it was reasoned that it would be easier to introduce the changes made by the Model Law into internal law by means of a uniform model law than to secure ratification of an international treaty. The Model Law when enacted by local legislation serves as an extension of existing national laws thereby making its acceptance and application relatively easier.[118]

Equally compelling is the argument that those states who for political, constitutional or other reasons were not able to accede to the New York Convention, may find it convenient

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[116] Redfern & Hunter, *supra* note 8 at 341.

[117] Kenneth T. Ungar, *supra* note 96 at 720.

[118] *Ibid.*

to adopt the Model Law.[119] Current trends indicate that this approach has alleviated the difficulties experienced by countries with a federal system of government in adopting international treaties into local legislation.[120] This is due to the fact that under a federal system of government, certain subject matters are under the exclusive legislative competence of either the central government or the component federating units. In view of the fact that provinces or states can now independently adopt the Model Law without the process of treaty ratification at the federal level, the Model Law has become easily adaptable to a federal system.[121]

Due to the comprehensive nature of the Model Law, considering that it covers rules of arbitration procedures including the recognition and enforcement of arbitral awards, it is believed that if states fashion their national laws on arbitration through the adoption of the UNCITRAL Model Law, this will lead to harmonisation of arbitration processes.[122] At the same time, it will also serve as a valuable precedent for countries without much experience or without modern legislation on arbitration.[123] On the other hand, most advanced countries which consider their legal system (arbitration laws) sufficiently modernised to accommodate

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[119] See Report of UNCITRAL 18th Sess., U.N. Doc. A/40/17, reprinted in (1985) 24 I.L.M. 1314 at para. 309. This informed the inclusion in the Model Law of the provisions on recognition and enforcement of arbitral awards contained in the New York Convention.

[120] For example the United States participated actively during the New York Conference, but was unable to accede to the Convention until 1970.

[121] This is particularly true of Canada which became the first state to adopt the Model Law. Hitherto, Canada was engaged in protracted negotiation with the component provinces for their support to ratify the New York Convention.

[122] D.R. Haigh Q.C., A.K. Kunetski & C.M. Anthony, *supra* 90 at 141.

[123] Pierre Lalive, "The New Swiss Law On International Arbitration" (1988) 4 Arbitration International 2 at 5.

economic and political globalisation hold the view that the Model Law is not necessary to improve their already advanced laws.[124] However, owing to the comprehensiveness of the Model Law and in order to maintain a degree of uniformity, it has been argued that even states with modern international arbitration law should update such laws with the relevant provisions of the Model Law.[125]

Today, the principal international instruments dealing specifically with the recognition and enforcement of arbitration agreements and arbitral awards are the New York Convention and the UNCITRAL Modern Law. States which implement the New York Convention and/or adopt the Model Law have revolutionised their arbitral culture. Thus, arbitration statutes have become identified as "user friendly" based on whether or not they can be classified broadly as Model Law-inspired.[126] On the other hand, ratification of the New York Convention is essential in order to ensure mandatory application of universal rules of recognition and enforcement of foreign arbitral awards.

It is, therefore, imperative that lawyers and other interest groups in international commercial arbitration familiarise themselves with the provisions of the New York Convention and the UNCITRAL Model Law. It is in this respect that a detailed overview of the provisions of the New York Convention and the Model Law is carried out in the next chapter. However, it is important to note that, apart from the New York Convention and the

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[124] Ljiljana Biukovic, "Impact of the Adoption of the Model Law in Canada: Creating a New Environment for International Arbitration" (1998) 30 Canadian Business Law Journal 376 at 378.

[125] Daniel M. Kolkey, *supra* note 100 at 17.

[126] James H. Carter, "The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?" (1993-94) 15 Michigan Journal of International Law 785 at 796.

UNCITRAL Model Law, there are other conventions which contain provisions relating to the recognition and enforcement of arbitral awards. I will briefly discuss some of these treaties below.

2.6. REGIONAL AND SPECIALISED CONVENTIONS ON INTERNATIONAL COMMERCIAL ARBITRATION

2.6.a. *The European Convention on International Commercial Arbitration*

In October of 1954, the United Nations Economic Commission for Europe (UNECE) under its Trade Development Committee concerned with problems of international arbitration of private disputes, set up a special working party to examine how to improve arbitration law in order to make commercial relations easier between European states.[127] On April 21, 1961 at Geneva, the special working party having concluded its assignment, the UNECE adopted the European Convention.[128]

The objective of the Convention is, according to its Preamble, to promote "development of European trade by, as far as possible, removing certain difficulties that may impede the organisation and operation of international commercial arbitration in relations between physical or legal persons of different European countries."

Although the text of the Convention avoids using the term "Eastern and Western European countries" its primary focus is arbitration in East-West trade.[129] It is, however, open

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[127] See P. I. Benjamin, "The European Convention on International Commercial Arbitration" (1961) 37 British Year book on International Law 478.

[128] *European Convention on International Commercial Arbitration*, 484 U.N.T.S. 364 (1963-64).

[129] P. I. Benjamin, *ibid.*, at 478, Albert van den Berg, *supra* note at 23 at 93.

for adhesion by non-European Countries.[130] Article I of the Convention provides that it applies to "arbitration agreements concluded for the purpose of settling disputes arising from international trade between .... persons having ... their habitual place of residence ... in different contracting states."[131]

The European Convention does not deal directly with recognition and enforcement of arbitral awards. In view of the fact that the New York Convention was concluded shortly before the European Convention, its working group decided that the European Convention should serve as a complement to the New York Convention.[132] The European Convention, however, differs from the New York Convention insofar as it contains limitations upon the grounds for setting aside an award.[133] Beyond this modest achievement, the European Convention has failed to meet its objective, as the Convention has never been applied in East-West relations.[134]

2.6.b. The ICSID (Washington) Convention

The search for an institutional framework for the conciliation and arbitration of

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[130] European Convention, *supra* note 128, Article X. The following countries have adhered to the Convention: Austria, Belarus, Belgium, Bulgaria, Burkina Faso, Cuba, Czechoslovakia (now, Czech Republic), Denmark, France, Germany, Hungary, Italy, Luxembourg, Poland, Romania, Russian Federation, Sylvania, Spain, Turkey, Ukrainian SSR, (former) USSR, and Yugoslavia. See P. I. Benjamin, *ibid.*, 127 at 478. See also Albert van den Berg, "Annulment of Awards in International Arbitration" in Richard B. Lillich & Charles N. Brower, eds., *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?* (New York: Transnational Publishers, Inc.,1992) 133 at 140.

[131] European Convention, *ibid.*, Article 1.

[132] Rene David, *supra* note 2 at 156; Redfern & Hunter, *supra* note 8 at 351.

[133] European Convention, *supra* note 128, Article IX. Although the New York Convention recognises the setting aside of an award, it provided no grounds upon which an award may be set aside.

[134] Albert van den Berg, *supra* note 130 at 153.

investment disputes between states and foreign private parties resulted in an international convention drafted under the auspices of the World Bank.[135] On March 18, 1965, in Washington, D.C., the draft convention was adopted by the governments of the member states of the World Bank as the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.*[136]

The Convention applies specifically to disputes arising out of investments made in a contracting state by a national of another contracting state. The International Centre for the Settlement of Investment Disputes (ICSID) was established by the Convention to provide administrative and operational facilities necessary for the conduct of arbitration under the Convention.[137] Arbitration under the Convention is administered by ICSID solely on the basis of the provisions of the Convention and its Rules and Regulations, to the exclusion of any national arbitration law.[138] The Convention is invoked if there is a legal dispute arising directly out of an investment between a contracting state and a national of another state, and if the parties to the dispute have consented in writing to the jurisdiction of ICSID.[139]

Recognition and enforcement of arbitral awards under the ICSID Convention is made

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[135] Okezie Chukwumerije, "International Law and Article 42 of the ICSID Convention" (1997) 14 Journal of International Arbitration 79.

[136] *ICSID Convention*, 575 U.N.T.S. 160 (1966) (in force on October 14, 1966). As at June 30, 1999, 146 states have signed the Convention while 131 of them have deposited their instrument of ratification. See ICSID Website <http://www.worldbank.org/icsid/constate/c-states-en.htm> (accessed on October 6, 1999), *ICSID 1999 Annual Report*, Annex 1 at 21-23.

[137] ICSID Convention, *ibid*, Article 1(2).

[138] Albert van den Berg, "Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions" (1987) 2 ICSID Review 439 at 441.

[139] ICSID Convention, *supra* note 136, Article 25.

extremely simple. Any party may obtain enforcement of the award by merely furnishing a copy of the award, certified by the Secretary-General of ICSID, to the competent court designated for that purpose by each contracting state. The Convention does not permit judicial review of the award and allows only the recourses of annulment or revision of the award specifically provided for in the Convention.[140] Also, it contains no defences to the enforcement of ICSID awards.[141] It provides that:

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.[142]

Although the New York Convention and the Model Law may be applied to arbitral awards resulting from an investment dispute between a state and a foreign national, parties are likely to pursue such dispute under the ICSID Convention because of its advantageous enforcement mechanism.[143]

Arbitration and conciliation proceedings which do not fall within the ICSID Convention may also be administered by the ICSID Secretariat under its "Additional Facility" scheme established in 1978.[144] "This facility is available, for example, where one of the parties

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[140] ICSID awards may be annulled by an *ad hoc* committee appointed from the panel of ICSID arbitrators. See ICSID Convention, *supra* note 136, Article 52. Some ICSID Awards have been annulled by the *ad hoc* committee.

[141] ICSID Convention, *ibid.*, Article 53 provides that the award shall be binding on the parties.

[142] ICSID Convention, *ibid.*, Article 54(1).

[143] Albert van den Berg, *supra* note 138 at 441.

[144] See Aron Broches, "The 'Additional Facility' of the International Centre for Settlement of Investment Disputes (ICSID)" in Pieter Sanders, ed.,*Yearbook Commercial Arbitration*, *supra* note 92 at 373.

is not a contracting state or the national of a contracting state."[145] Arbitral awards made under the Additional Facility scheme are not enforceable under the ICSID Convention. In view of this, Article 20 of the ICSID Arbitration (Additional Facility) Rules provides that proceedings may only be held in countries which are parties to the New York Convention. Thus, the provisions of the New York Convention will apply to the recognition and enforcement of such awards.

2.6.c. The Panama Convention

Many of the Latin American States hesitated to sign the New York Convention because of their perceived mistrust of world organisations.[146] As a result, on January 30, 1975 the First Specialised Conference on Private International Law in Panama concluded the *Inter-American Convention on International Commercial Arbitration*.[147] The Panama Convention is, however, modelled after the New York Convention and has been signed by about twenty states.[148]

A remarkable difference between the Panama Convention and the New York Convention is that the Panama Convention does not contain provisions for the enforcement

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[145] Redfern & Hunter, *supra* note 8 at 34.

[146] Albert van den Berg, *supra* note 23 at 101.

[147] (1975) 14 I.L.M. 336.

[148] The countries include: Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, the Dominican Republic, and Nicaragua. See Andre J. Brunel, "A Proposal to Adopt UNCITRAL's Model Law on International Commercial Arbitration as Federal Law" (1990) 25 Texas International Law Journal 43 at 53 (footnote 78). See Also Jane L. Volz & Roger S. Haydock, *supra* note 21 at 883.

of arbitration agreements.[149] Also, if the parties fail to agree upon the procedure for arbitration, the Inter-American Commercial Arbitration Commission (IACAC) rules of procedure will apply.[150]

Under the Panama Convention, arbitral awards are enforced as if the award were a judgment of a court. The Convention obliges reciprocal enforcement of awards in contracting states. It provides that:

> An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of a decision handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.[151]

Considering that the Latin American countries were initially unwilling to utilise arbitration to settle private disputes,[152] the Panama Convention demonstrates a positive step in commercial arbitration in that region. However, the "mistrust" that led to the Convention has now waned as more Latin American countries have now adhered to the New York Convention, thereby leaving the Panama Convention playing a minimal role in international commercial arbitration.[153]

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[149] Panama Convention, *supra* note 147, Article 1. Thus, where a party takes legal proceedings over a dispute covered by the arbitration agreement, the Convention cannot compel it to arbitration.

[150] Panama Convention, *ibid.*, Article 3. These rules now corresponds with the UNCITRAL Arbitration Rules, 1976.

[151] Panama Convention, *ibid.*, Article 4.

[152] Justine Daly, "Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After the NAFTA" (1994) 25 St. Mary's Law Journal 1147 at 1162.

[153] Albert Jan van den Berg, "The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?" (1989) 5 Arbitration International 214 at 229.

2.7. COMMENTARY ON REGIONAL AND SPECIALISED CONVENTIONS ON INTERNATIONAL COMMERCIAL ARBITRATION

The effect of the European Convention and the Panama Convention has dropped significantly because most states have signed the 1958 New York Convention. This is mainly due to the fact that the two treaties did not adequately provide for the enforcement of arbitration agreements and arbitral awards. Whilst the European Convention failed to provide for both the enforcement of arbitration agreements and arbitral awards, the Panama Convention covers only the enforcement of arbitral awards. In view of this, the treaties can hardly serve the purpose of international commercial arbitration. Their usefulness, if any, is that they apply as supplements to the New York Convention.[154]

On the other hand, the ICSID Convention is somewhat restrictive in its application. The Convention applies to specialised arbitration of investment disputes between a state and a national of another state. The ICSID Convention has, however, been incorporated in over a thousand bilateral investment agreements and several free trade agreements.[155]

As a result of these limitations, the New York Convention and the Model Law are the most widely used instruments in international commercial arbitration. The salient provisions of these instruments are thus discussed in Chapter 3 below.

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[154] Redfern & Hunter, *supra* note 8 at 47.

[155] See the *North American Free Trade Agreement*, Chapter 11 (1993) 32 I.L.M. 289, *Canada-Chile Free Trade Agreement*, Chapter 5, S.C. 1997, c.14. Also see Antonio R. Parra, "The Role of ICSID in the Settlement of Investment Disputes" (1999) 16 News from ICSID 5 at 7, *ICSID 1999 Annual Report*, *supra* note 136 at 4.

CHAPTER 3

OVERVIEW OF THE NEW YORK CONVENTION AND THE UNCITRAL MODEL LAW

3.1. INTRODUCTION

The development of transnational instruments on international commercial arbitration has passed through the rudimentary stages of the Geneva treaties.[1] Today, the laws are getting more complex just as the system is gaining wider publicity.

Amongst international instruments that have been concluded in international commercial arbitration, the 1958 New York Convention[2] and the UNCITRAL Model Law 1985[3] are remarkable. As will be shown in this study, a combination of these instruments provides comprehensive laws for the recognition and enforcement of international commercial arbitration agreements and arbitral awards.

This study, however, does not pretend to, and cannot exhaustively discuss, all the provisions of these two instruments. Instead, an overview will be provided in this chapter in order to present a working understanding of the New York Convention and the Model Law as they relate to the recognition and enforcement of arbitral awards. The second section of this chapter examines the New York Convention. The third section looks at the UNCITRAL Model Law. In the third section, particular attention will be paid to additions and/or differences in the Model Law compared to the New York Convention. The fourth section

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[1] *Geneva Protocol on Arbitration Clauses of 1923*, 27 L.N.T.S. 158 and *Geneva Convention on the Execution of Foreign Arbitral Awards of 1927*, 92 L.N.T.S. 301.

[2] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. E/CONF.26/9/Rev. 1, reprinted in 330 U.N.T.S. 38 (hereinafter the New York Convention).

[3] *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17 (1985), reprinted in (1985) 21 I.L.M. 1302 (hereinafter the Model Law).

contains a commentary that summarises this chapter.

3.2. THE 1958 NEW YORK CONVENTION

3.2.a. *Scope of Application*

Article I(1) of the New York Convention provides that the Convention shall apply to the "recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought."

Accordingly, the Convention applies to all arbitral awards rendered in a country other than the state of enforcement whether or not such awards are regarded as domestic. The Convention also extends to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought, whether or not such awards may have been rendered in the territory of the state.[4]

The categorisation of international arbitral awards into foreign or domestic based on the place of arbitration represents a combination of the territorial principle criterion introduced by the first part of Article I(1) and the national principle criterion contained in the second part of that Article.[5] The merger of the territorial and national principles in Article I(1) is a result of a compromise reached by the Working Group on the New York Convention, in order to accommodate the views expressed by the representatives of the

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[4] New York Convention, *supra* note 2, Article I(1). Also see Paolo Contini, "International Commercial Arbitration: the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1959) 8 American Journal of Comparative Law 283 at 293-294.

[5] Pieter Sanders, "The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1959) Netherlands International Law Review 43 at 45.

various nations.[6]

However, the major concern of the majority at the Conference was that the primary goal of the New York Convention should be making arbitral awards rendered in a "foreign" country enforceable in any other state that is a party to the Convention.[7] As a result, the Convention applies automatically with respect to foreign arbitral awards. However, the extension of the Convention to arbitral awards made within the state where enforcement is sought depends on whether or not the national law of the enforcing state regards the award as domestic or non-domestic. Where the national law of the place of arbitration "disowns" such award as "non-domestic", the New York Convention offers a basis for recognition and enforcement of the award. This approach attaches undue emphasis on the place of arbitration.

It is not correct to assume that an award made within the territory of a country is a domestic award. Parties to international commercial arbitration may expressly exclude the application of the forum law in the arbitration of their disputes.[8] The laws of the forum may only apply where the parties provide for it or in the event that the applicable law (*lex arbitri*) does not cover all aspects of the arbitration proceedings.[9] Thus, depending on the intentions of the parties, the forum law may play a minimal role in the determination of the arbitration.

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[6] Pieter Sanders, *supra* note 5 at 45.

[7] Stephen T. Ostrowski and Yuval Shany, "Chromalloy: United States Law and International Arbitration at the Crossroads" (1998) 73 New York University Law Review 1650 at 1655 (hereinafter Ostrowski & Shany).

[8] Pieter Sanders, *ibid.*, at 48.

[9] *Ibid.*

Several other factors may inform the choice of the place of arbitration.[10] It should, therefore, not be inferred that accepting a state as a place of arbitration invariably supposes the acceptance of the application of its forum law or that the award should be regarded as domestic to the state where the arbitration was held.

Article I(1) also extends the application of the New York Convention to the recognition and enforcement of arbitral awards "arising out of differences between persons, whether physical or legal." This phrase has been interpreted to the effect that the Convention covers public enterprises and public utilities acting within the realm of private law.[11] The same can be said of a state proper and its agencies in their commercial relations where such state has agreed to submit to arbitration.[12] It is, however, doubtful whether that would be true in the case where a state acts in the exercise of its sovereign authority.[13]

Also, the fact that a state which is a party to an arbitration proceeding has not ratified or acceded to the New York Convention is irrelevant, provided the state where the award was made is a contracting party to the Convention.[14] Similarly, the application of the New York

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[10] See Daniel M. Kolkey, "Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations" (1988) 22 International Lawyer 693 where he noted that the parties may consider issues such as neutrality, general legal climate, and status as a signatory to the New York Convention.

[11] Paolo Contini, *supra* note 4 at 292.

[12] *Ibid.*

[13] See *Gates* v. *Fletcher's Fine Foods, Alberta Pork Producers Development Corporation*, 54 F. 3d 1457 (9th Cir. 1995).

[14] See La Societe Nationale *(Sonatrach)* v. *Shaeen Natural Resources Company, Inc.*, 585 F.Supp. 57 (S.D.N.Y. 1983), affirmed 733 F. 2d. 260 (2d. Cir. 1984). Algeria was at that time not a contracting state to the Convention but was able to obtain an order for the enforcement of the award against a U.S. company. See also Georges R. Delaume, "Recognition and Enforcement of State Contract Awards in the United States: A Restatement" (1997) 91 American Journal of International Law 476 at 478.

Convention does not depend on the nationality of the parties. Thus, a United States court will apply the Convention to an award made in France between a United States corporation and an Ethiopian party, even though Ethiopia was and is not a contracting state to the Convention, because France is a contracting party to the Convention.[15]

However, a contracting state making the reciprocity reservation[16] indicates that the state will not apply the Convention to arbitral awards rendered in a country which has not adhered to the Convention.[17] Obviously, the state also will not apply the Convention notwithstanding that the parties to the arbitration agreement are nationals of contracting states to the Convention. On the other hand, the "commercial reservation" allows a contracting state to limit its application of the Convention to commercial relationships as determined by its national laws. Due to the disparity in national laws of the contracting states, it is apparent that the word "commercial" will be understood differently.[18]

These reservations underscore the continuing importance of national law in the implementation of the Convention.[19] As at October, 1999 about 63 countries have made the reciprocity reservation and 41 countries have made the commercial reservation out of a total

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[15] See *Imperial Ethiopian Government* v. *Baruch Foster Corp*, 535 F.2d 334 (5th Cir. 1976), *Republic of Gabon* v. *Swiss Oil Corporation* (1989) 14 Yearbook Commercial Arbitration 621 where the Grand court of Cayman Island granted Gabon national oil company (the award creditor) an enforcement order against a cayman Islands company. Gabon is still not a contracting state to the Convention. See also Albert Jan van den Berg, *The New York Arbitration of 1958* (Deventer: Kluwer Law and Taxation Publishers, 1981) at 15.

[16] See discussion on the reciprocity and commercial reservations in Chapter 2 at 29-31.

[17] Pieter Sanders, *supra* note 5 at 47.

[18] Albert van den Berg, *ibid.*, at 53.

[19] Thomas E. Carbonneau, "Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce" (1984) 19 Texas International Law Journal 33 at 86.

of 121 contracting states to the Convention.[20] However, because of the increasing number of states that have became parties to the Convention, the reciprocity reservation is having diminishing effects on the applicability of the New York Convention.[21]

3.2.b. Enforcement of Arbitration Agreements

The New York Convention was the first international treaty to provide that an arbitration agreement must be in writing. The rationale for this requirement is that it avoids the difficulties of proving an oral arbitration agreement. Article II(1) of the Convention therefore obliges each contracting state to recognise an agreement in writing by which the parties undertake to submit their differences to arbitration.

Also, to prevent the problem of having to conclude a formal written agreement, Article II(2) broadly defines an "agreement in writing" to include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters. It is important that arbitration agreements conform with the specified requirements in order to come within the scope of the Convention.[22] It is also relevant at a latter stage after the award has been made as it may be invoked as a ground for challenging the recognition and enforcement of arbitral awards.[23]

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[20] The number of states that made the reciprocity reservation is slightly above 50% of the total number of countries that have acceded to the Convention, which stood at 121. See UNCITRAL Website - <http:/www.un.or.at/uncitral/en-index.htm> (accessed on October 9, 1999).

[21] Stephen D. Mau, "Hong Kong's Experience with the New York Convention: An Introduction" (1996) 9 Transnational Lawyer 393 at 401.

[22] Kevin Kennedy, "International Commercial Arbitration Legislation in the State of Michigan: A Proposal" (1990) Detroit College of Law Review 867 at 909.

[23] See New York Convention, *supra* note 2, Article V(1)(a).

Article II(3) further obliges contracting states when seised of an action covered by an arbitration agreement that conforms with the requirements of Article II(2) to refer the parties to arbitration. Under this provision, courts of contracting states are required to order specific performance of arbitration agreements by compelling an unwilling party to arbitrate. In a number of cases, U.S. and Canadian courts[24] have shown their willingness to honour arbitration agreements in international commercial contracts.[25] In practice, the courts also order a stay of court proceedings pending the conclusion of the arbitration.[26]

Article II(3), however, provides that the courts are not obliged to refer the parties to arbitration if "it finds that the said agreement is null and void, inoperative, or incapable of being performed." The New York Convention does not include definitions of these words.[27] The Convention also does not specify the governing law which shall determine the validity

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[24] For Canadian courts decisions on enforcement of arbitration agreements see *infra* notes 80 & 81.

[25] See *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974). The U.S. Supreme court observed that arbitral agreements to select a forum and governing law play a crucial role in international business transactions by providing certainty for the parties. Thus, the court opined that:
a parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages... [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.
The principle enunciated in *Scherk* has been followed by U.S. courts in subsequent cases such as *Hanes Corp.* v. *Millard*, 531 F.2d 585 (D.C. Cir. 1976); *Star-Kist Foods, Inc.* v. *Diakan Hope, S.A.*, 423 F. Supp. 1220 (D.C. Cal. 1976). In *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1984), the court referred to *Scherk* and concluded that:
concerns of international comity, respect for capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause in question.

[26] Leonard V. Quigley, "Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1960-61) 70 Yale Law Report 1049 at 1064.

[27] See Albert van den Berg, *supra* note 15 at 154-160 discussing the possible meanings of the words.

of arbitration agreements.[28] In view of these lacunae, it has been suggested that the law specified by the parties in their agreement should be applied by the courts to determine when an arbitration agreement is unenforceable under Article II(3) of the Convention.[29] If the agreement does not contain a choice of law clause, the court may decide the validity of arbitration agreements by reference to the conflict rules of the forum.[30]

3.2.c. Recognition and Enforcement of Arbitral Awards

The New York Convention contains a general obligation for the recognition of arbitral awards. Article III of the Convention provides that:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

In addition, the enforcing court must not impose "substantially more onerous conditions or higher fees or charges" on foreign arbitral awards than it imposes on domestic ones.[31] The phrase, "substantially more onerous conditions" was introduced in order "to ensure that no additional restrictions were imposed which might impede the free enforcement of arbitral awards."[32] While the provision demands nondiscrimination between domestic and foreign awards with respect to the application of local fees and charges, the provision does

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[28] Paolo Contini, *supra* note 4 at 296.

[29] Leonard V. Quigley, *supra* note 26 at 1064.

[30] Albert van den Berg, *supra* note 15 at 156.

[31] New York Convention, *supra* note 2, Article III.

[32] Pieter Sanders, *supra* note 5 at 51.

not require the state to apply the identical enforcement procedure to foreign awards as it applies to domestic awards.[33]

Thus, contracting states have been left free to establish different procedures for the recognition and enforcement of foreign awards within the limits of the rule prohibiting "substantially more onerous conditions."[34] The legislative history of the Convention suggests that any condition going beyond a reasonable method of ascertaining that the award is covered by the Convention would be substantially more onerous.[35] In addition, Article IV has narrowed the requirements for obtaining recognition and enforcement of arbitral awards under the Convention.[36]

On production of the arbitration agreement and award, the party seeking enforcement of the award establishes a *prima facie* case and the burden shifts to the party challenging the award to establish the invalidity of the award on any of the limited grounds provided in Article V(1)(a-e) of the Convention.[37] The grounds for challenge of an award are:

(a) Absence of a valid arbitration agreement or incapacity of the parties to conclude an arbitration agreement.
(b) Lack of a fair opportunity to be heard.
(c) The award or an inseparable part of it exceeds the scope of the submission to arbitration.
(d) Composition of the arbitral tribunal or procedure is not in accordance with the arbitration agreement or the law of the place of arbitration.

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[33] Paolo Contini, *supra* note 4 at 297.

[34] Leonard V. Quigley, *supra* note 26 at 1065.

[35] See U.N. Doc. No. E/CONF. 26/SR. 11 at 5 (1958).

[36] See discussion in Chapter 2, at 26-27.

[37] Leonard V. Quigley, *ibid.*, at 1066.

(e) The award is not binding or has been set aside or suspended.[38]

In addition, Article V(2)(a-b) provides that the competent authority where the enforcement is sought may *ex officio* refuse recognition or enforcement of the arbitral award if the authority finds that:

(a) the subject matter of the difference is not capable of settlement by arbitration under the laws of that country; or
(b) the recognition or enforcement of the award would be contrary to the public policy of that country.[39]

Under Article VI, the enforcing court may adjourn the enforcement proceedings if an application to set aside or suspend the award has been made in the country of origin or under the law of which the award was made.

On the application of the party seeking enforcement of the award, the court may order the party seeking to adjourn the enforcement of the award to give suitable security.[40] The proviso which allows the enforcing court to order the opposing party to give suitable security was criticised as having the "unusual and exceptionable effect of penalising a defendant for seeking to defend his rights...".[41] This argument, in my view, ignores the fact that the possibility of requiring security from the opposing party will discourage frivolous or vexatious applications.

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[38] See Appendix 1 for the extracts of the New York Convention.

[39] A detailed examination of the grounds for challenging arbitral awards are examined in Chapter 4 below.

[40] New York Convention, *supra* note 2, Article VI.

[41] Leonard V. Quigley, *supra* note 26 at 1071(footnote 94) referring to the comment of the U.S. delegation to the New York Conference.

3.2.d. *Miscellaneous Provisions*

3.2.d.i. Effect on Other Treaties

By virtue of Article VII(1), the New York Convention recognises the validity of other multilateral or bilateral agreements that deal with the recognition and enforcement of arbitral awards entered into by contracting states to the Convention. It, therefore, does not deprive the parties of their rights to base their request for enforcement of arbitral awards on such agreements.[42]

Some of the agreements that relate to the recognition and enforcement of arbitral awards are the *European Convention on International Commercial Arbitration*,[43] the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID)*,[44] the *Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Co-operation*,[45] the *Inter-American Convention on International Commercial Arbitration*[46] and a host of other bilateral agreements on recognition and enforcement of arbitral awards.

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[42] Albert Van den Berg, *supra* note 15 at 81.

[43] *European Convention of 1961*, 484 U.N.T.S. 364 (1963-1964). See dicussion in Chapter 2 at 42.

[44] *Washington Convention of 1965*, 575 U.N.T.S. 160 (1966). See Chapter 2 at 43-46.

[45] *Moscow Convention of 1972*. The English text is published in Schmitthoff, *International Commercial Arbitration, Documents and Selected Papers*, Pt. III. at 1. The Convention applies to member states grouped under the Council for Mutual Economic Assistance (CMEA). The purpose of the Convention is to regulate the settlement by arbitration of disputes arising from economic, scientific and technical co-operation within member countries of the CMEA. See Alan Redfern & Martin Hunter, *International Commercial Arbitration* (London: Sweet & Maxwell, 1986) at 351.

[46] *Panama Convention of 1975*, (1975) 14 I.L.M. 336. See dicussion in Chapter 2 at 46.

However, the exact scope of Article VII(1) has been a subject of controversy.[47] It has been held that Article VII(1) introduces the "most favourable right principle," which extends not only to treaties but also to purely domestic laws that are more pro-enforcement than the Convention.[48] Furthermore, it has been opined that the New York Convention represents the minimum standard from which states cannot derogate, and that Article VII(1) permits states to retain existing liberal norms or take further unilateral steps to facilitate enforcement of arbitral awards.[49] Consequently, the provision must pertain only to the party seeking enforcement of the award in order to avoid a result wholly inconsistent with the pro-enforcement bias of the Convention.[50] However, it is important to note that the language of Article VII does not preclude a party opposing enforcement of the award to also rely upon defences to enforcement under domestic or treaty laws.

On the other hand, the Geneva treaties were considered to be too similar to the New York Convention to be retained as conflicting obligations of the contracting states.[51] Thus,

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[47] Ostrowski & Shany, *supra* note 7 at 1658.

[48] See *Soviet Danube Steam Navigation Company (USSR)* v. *Travel Agency (FR. Germ)* (German *Oberlandesgericht* [Court of Appeal], judgment of June 29, 1989 cited in Albert van den Berg, ed., *Yearbook Commercial Arbitration*, Vol. 16 (Deventer: Kluwer Law and Taxation Publishers, 1991) 546 at 547. See also Vincent Sama, "Problems in Enforcement of Foreign Arbitral Awards" (1995) 6 World Arbitration & Mediation Report 77.

[49] See Ostrowski & Shany, *supra* note 7 at 1659. See also Jan Paulsson, "Rediscovering the New York Convention: Further Reflections on Chromalloy" (1997) 12 Mealey's International Arbitration Report 20 where he argued that Article VII provides that "national rules or indeed other treaties shall be given preference if they are more favourable to enforcement." Also see Albert van den Berg, *supra* note 15 at 88 expressing the view that Article VII calls for the application of a state's domestic or treaty law when such law provides more liberal grounds for enforcement than under the Convention.

[50] Albert van den Berg, *supra* note 15 at 84 where he referred to the *Bundesgerichtshof*, [German Supreme Court] judgment of February 12, 1977) which ruled decisively that only the party seeking enforcement may rely upon Article VII(1) of the New York Convention.

[51] Leonard V. Quigley, *supra* note 26 at 1071.

Article VII(2) provides that the Geneva treaties shall cease to have effect between contracting states on their becoming bound by the Convention. In effect, the Geneva treaties do not "revive" even when the New York Convention cannot be applied for any reason.[52] The repeal of the Geneva treaties is, however, not complete as they continue to apply to contracting states to the Geneva treaties that have not acceded to the New York Convention.

3.2.d.ii. Final Clauses

Due to the difficulties of implementing international treaties in countries under a federal or non-unitary government, Article XI purports to limit the obligation of such countries to those articles of the Convention within the legislative jurisdiction of the federal authority. The federal government is only obliged to bring to the notice of the states or provinces, with a favourable recommendation, those aspects of the Convention within the legislative competence of the states or provinces. However, this provision does not resolve the problems of application of the New York Convention to such countries.[53]

Another provision of the Convention that should be mentioned is Article XIV, often referred to as the general reciprocity reservation clause. It states that a contracting state shall not be entitled to avail itself of the provisions of the Convention against other contracting states except to the extent that the state is bound to apply the Convention. The provision allows other states to take advantage of another state's reservation with respect to the reciprocal, commercial and the federal provisions. Article XIV will most likely extend to

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[52] Albert van den Berg, *supra* note 15 at 114.

[53] For example, the United States was unable to accede to the Convention until 1970. Also Canada was engaged in protracted negotiation with the provinces and as such did not sign the Convention until 1985.

cases where the courts of a contracting state to the Convention have placed a restrictive interpretation upon the state's obligation under the Convention.[54]

3.3. The UNCITRAL Model Law

Much of what is contained in the Model Law duplicates the New York Convention provisions. Therefore, this chapter will focus on the aspects of the Model Law that differ from the New York Convention. The Model Law, unlike the New York Convention, does not have a legal effect of its own except when a state chooses to revise or adopt a national arbitration law based on the Model Law provisions. The state may also depart from the Model Law to the extent it considers necessary to accommodate its peculiar needs.

The Model Law is more comprehensive than the New York Convention because it contains provisions concerning the conduct of arbitration proceedings. It also contains grounds for setting aside an award at the place where it was made and it adopted the grounds stated in the Convention for refusing to recognise and enforce an award.

3.3.a. Level and Scope of Application

Article 1(1) of the Model Law expresses the substantive scope of application of the Model Law. It states that the Model Law, when adopted into the national law of a state, applies to "international commercial arbitration." The provision contains two fundamental terms "international" and "commercial", which received intensive discussion by the

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[54] Leonard V. Quigley, *supra* note 26 at 1074.

UNCITRAL Working Group during its preparation of the Model Law.[55]

Article 1(3) of the Model Law provides an expansive definition of the word "international" by reference to various connecting alternative factors relating to the parties. It states that an arbitration is "international" if:

> (a) the parties have at the time of conclusion of the arbitration agreement, their places of business in different countries;
> (b) any of the following places is outside the state in which the parties have their places of business:
> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement or
> (ii) the place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected;
> (c) the parties expressly agree that the subject matter of the arbitration relates to more than one country.

Thus, under the Model Law, if the parties' places of business are in different states, the arbitration is international.[56] With respect to parties who have multiple places of business or parties with no place of business, the Model Law applies special rules. First, for a party who has multiple places of business, Article 1(4)(a) provides that the relevant place is "that which has the closest relationship to the arbitration agreement." Second, if a party has no place of business, Article 1(4)(b) states that his place of business for this purpose is his habitual residence.

While the parties' place of business may be easily ascertained, for a party (e.g. a corporation) with multiple places of business, it may be difficult to determine the place of

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[55] See Robert K. Paterson, "International Commercial Arbitration Act: An Overview" in Robert K. Paterson & Bonita J. Thompson, eds., *UNCITRAL Arbitration Model in Canada* (Vancouver: The Carswell Company Limited, 1987) 113 at 115.

[56] Model Law, *supra* note 3, Article 1(3)(a).

business that has the "closest relationship" with the arbitration agreement. An often cited example is where a parent and a subsidiary company participated at different stages in concluding a contract with another company.

The problem of determining the one place of business out of many which has the "closest relationship" with the agreement is illustrated by a hypothetical situation where, for example, a Canadian subsidiary on behalf of an American parent company commenced negotiation of a contract which includes an arbitration agreement, but the contract was finally concluded at the company's head office in the United States. It may be difficult to determine whether the subsidiary's or the parent's place of business has the closest relationship with the arbitration agreement.[57] It is my considered opinion that reference should be made to the branch of the company that has the primary responsibility to execute the contract because it is this branch which deals directly with the other party.

Also, where the parties have their respective places of business in the same state, an arbitration may nevertheless be international if the parties stipulate in the arbitration agreement, or it is otherwise determined, that the place of arbitration shall be held in another country.[58] Alternatively, reference is made to the place where a substantial part of the contract obligation is performed or with which the subject matter of the dispute is most closely connected.[59]

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[57] See Joost Blom, "Conflict of Laws Aspect of the International Commercial Arbitration Act" in Robert K. Paterson & Bonita J. Thompson, eds., *UNCITRAL Arbitration Model in Canada* (Vancouver: The Carswell Company Limited, 1987) 127 at 128.

[58] Model Law, *supra* note 3, Article 1(3)(b)(i).

[59] *Ibid.*, 1(3)(b)(ii).

In general, if the site of arbitration, the place of performance of the contract or subject-matter of the dispute is in or closely connected to a foreign state, the Model Law considers the resulting dispute "international".[60]

In addition, by virtue of Article 1(3)(c) of the Model Law, arbitration is international if the parties have expressly agreed that it relates to more than one country. This "opting-in" provision extends the scope of the Model Law to include disputes between nationals of the same state[61] or where all the connecting factors mentioned above are within a single country.[62]

At the UNCITRAL working session, some groups expressed concern that the parties to an arbitration agreement could exploit this provision to label as international a purely domestic dispute in order to evade special rules for domestic arbitration. The UNCITRAL Commission argued that the courts are unlikely to give effect to such an agreement.[63] This argument may suffice if recognition and enforcement of the award is sought in the country where the parties are nationals. However, if enforcement proceedings are brought in another country, courts of the country where the enforcement is sought are not likely to refuse recognition of the award on the basis only that the parties deliberately "internationalised" their dispute.[64]

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[60] Mary E. McNerney & Carlos A. Esplugues, "International Commercial Arbitration: The UNCITRAL Model Law" (1986) 9 Boston College International & Comparative Law Rev. 47 at 49.

[61] *Ibid.*, *supra* note 60 at 49.

[62] Joost Blom, *supra* note 57 at 128.

[63] See *Report of the United Nations Commission on International Trade on the Work of its Eighteen Session*, UN Doc. A/40/17 at 9.

[64] Petar Sarcevic, "The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law" in Petar Sarcevic, ed., *Essays on International Commercial Arbitration* (London: Graham & Trotman/Martinus Nijhoff, 1989) at 183.

In addition, it is important to note that some national arbitration laws have either modified or added to the provision of Article 1(3)(c) of the Model Law. For example, in Ontario, Article 1(3)(c) of the Model Law notwithstanding, an arbitration concluded in Ontario between parties that all have their places of business in Ontario is not international only because the parties have expressly agreed that the subject matter of the arbitration relates to more than one country.[65]

Although the UNCITRAL working group did not reach a decision on the exact definition of the term "commercial", in furtherance of the expansive scope of the Model Law the term is defined with regard to some examples of commercial matters contained in a footnote to Article 1(1). The accompanying note provides as follows:

> the term "commercial" should be given a wide interpretation so as to cover matters arising from all relations of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but not limited to, the following transactions: any trade for the supply or exchange of goods or services; distributions agreement; commercial representation or agency; factoring; leasing; construction works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.[66]

This note provides a non-exhaustive list of commercial relationships which embraces the variety of cases encountered in international arbitration practice.[67] The note also makes

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[65] *International Commercial Arbitration Act*, S.O. 1990, c. 19, s. 2(3). See also *Arbitration and Conciliation Act*, (Nigeria), 1990, c.19, s. 57(2). section 57(2) which provides that in addition to Article 1(3)(c) of the Model Law, an arbitration is international if the parties expressly agrees to treat any dispute arising out of their commercial transaction as international, the "true nature of the contract notwithstanding."

[66] Footnote to Article 1(1) of the Model Law, *supra* note 3.

[67] Gerold Herrmann, "The UNCITRAL Model Law - its Background, Salient Features and Purposes" (1985) 1 Arbitration International 6 at 13.

it clear that the intended meaning of commercial matters is not to be determined with reference to what national laws on arbitration regard as commercial.[68]

This list of commercial matters contained in Article 1(1) of the Model Law provides the courts and arbitrators with useful guidelines for the interpretation of contractual relationships that may be regarded as commercial within the ambit of the Model Law.[69] This is a remarkable departure from the New York Convention which inferentially confers on contracting states the right to determine unilaterally what constitutes a commercial relationship.[70]

The expansive scope of the UNCITRAL Model Law is, however, limited by Article 1(1) to "any agreement in force" between the state adopting the Model Law and any other state or states.[71] Thus, the Model Law expressly provides that it is subservient to any multilateral or bilateral agreement in force in the state enacting the Model Law.[72] Although not clearly stated, reference to "any agreement" should be restricted to agreements relating to international arbitration. In this regard, the Model Law leaves undisturbed international conventions such as the New York Convention.

Article 1(5) contains another limitation on the scope of the Model Law. It states that

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[68] Gerold Herrmann, *supra* note 67 at 13, Robert K. Paterson, *supra* note 55 at 116.

[69] D. R. Haigh Q.C., A. K. Kunetski & C. M. Anthony, "International Commercial Arbitration and the Canadian Experience" (1995) 34 Alberta Law Review 137 at 144.

[70] New York Convention, *supra* note 2, Article I(3) provides that a state reserves the right to decide whether to apply the Convention "only to differences arising out of legal relationships, ...which are considered as commercial under the national law of the state.."

[71] UNCITRAL Model Law, *supra* note 3, Article 1(1).

[72] Gerold Herrmann, "The UNCITRAL Model Law on International Commercial Arbitration: Introduction & General Provisions" in Petar Sarcevic, ed., *Essays on Int'l Commercial Arbitration*, *supra* note 64 at 20.

the Model Law:

> shall not affect any other law of this state by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 1(5) became necessary due to the concern raised in connection with the illustrative list of commercial relationships contained in the footnote to Article 1(1) of the Model Law. It was feared that this could be construed as meaning "in positive terms that any dispute arising therefrom would be capable of settlement by arbitration."[73] In order to clarify the situation, Article 1(5) was added to make it clear that the Model Law does not apply where national laws exclude certain disputes from arbitration.[74]

Also, it is important to note that not all provisions of the Model Law are of international application. In this respect, Article 1(2) provides that the Model Law only applies (with the exception of Articles 8, 9, 35 and 36), to the "model state"[75] if "the place of arbitration is in the territory of the state." The territorial limitation on those provisions of the Model Law is understandable as they contain rules of procedure for the arbitral process and grounds for setting aside awards which apply only to arbitrations held within the territory of the state. The purpose is to provide:

> a prudent solution for the issue of establishing a link between a given international arbitration and the law of one state. Above all, the strict territorial criterion provides certainty and is of considerable practical benefit in respect of Articles ... which entrust the courts with functions of

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[73] Gerold Herrmann, "UNCITRAL Adopts Model Law on International Commercial Arbitration" (1986) 2 Arbitration International 2 at 4.

[74] *Ibid.*

[75] This phrase refers to a state which adopted national arbitration law based on the UNCITRAL Model Law.

arbitration assistance and supervision.[76]

However, the excepted provisions (8, 9, 35 & 36) which deal with the recognition and enforcement of arbitration agreements and awards as well as interim measures of protection enjoy international application to the extent that those provisions apply whether or not the arbitration proceedings or the award were made within the territory of the state.

3.3.b. Enforcement of Arbitration Agreements

The form of an arbitration agreement under the Model Law follows closely Article II of the New York Convention with the addition of useful clarifications.[77] Article 7(2) of the Model Law expands the definition of "writing" in Article II(2) of the New York Convention to include various forms of telecommunications. It adds that an arbitration agreement can be found in "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another."[78]

Furthermore, the Model Law provides that a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.[79] Article 16(1) adds that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract such that a decision that the contract is null and void shall not entail automatic invalidity of the arbitration clause. Thus,

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[76] Gerold Herrmann, *supra* note 73 at 21.

[77] Gerold Herrmann, *supra* note 67 at 15.

[78] Model Law, *supra* note 3, Article 7(2).

[79] *Ibid.*

Article 16(1) enshrines the international commercial arbitration doctrine of severability of the arbitration clause from the contract.

The Model Law, like the New York Convention, imposes the same obligation on the courts to refer parties to an arbitration agreement to arbitration. Article 8(1) of the Model Law, however, introduces a time limit within which a party may apply to the court for such order. It states that a party to an arbitration agreement must request the court to compel the other party to arbitration "not later than when submitting his first statement on the substance of the dispute." This proviso has given rise to the defence of estoppel in an application for a stay of proceedings under Article 8 of the Model Law.

In general, Canadian courts have been inclined to grant an order staying proceedings in actions commenced in disregard of an arbitration agreement, especially when the agreement is contained in an international contract.[80] Also, in a number of cases, Canadian courts have considered at what point an applicant is estopped from seeking a stay of court proceedings as a result of "having taken steps in the legal proceedings" within the context of Article 8(1)

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[80] J. G. Castel, "The Enforcement of Agreements to Arbitrate and Arbitral Awards in Canada" (1991) Canada-United States Law Journal 491 at 498. See for example, *Kaverit Steel & Crane Ltd. et al.* v. *Kone Corp. et al* (1992) 85 Alta. L.R. (2d) 287 (Alta. C.A.), where the Court of Appeal reversed the decision of the Chambers judge refusing a stay of proceedings. The court pronounced unequivocally in favour of an order for a stay of proceedings. Also in *Automatic Systems Inc.* v. *Bracknell Corp.* (1994) 18 O.R. (3d) 257 (C.A.), the court was of the opinion that the directive in Article 8 of the Model Law is imperative in mandating that a matter agreed to be arbitrated be referred to arbitration, unless the conditions set out in Article 8 itself could be established. This opinion was reaffirmed by the Supreme Court of Canada in *Canadian National Railway Company* v. *Burlington Northern Railroad Company* (1997) 1 S.C.R. 5. The courts have also ordered a stay of proceedings even where the case involves third parties that are not parties to the arbitration agreement. See *Kaverit Steel Ltd., ibid.* See also *Nanisivik Mines Ltd.* v. *F.C.R.S. Shipping Ltd.* (1994) 2 F.C.R. 662 (C.A.). In *Boart Sweden AB* v. *NYA Stromnes AB* (1988) 41 B.L.R. 295, the court not only stayed proceedings on the matters within the scope of the arbitration agreement, but it also extended the stay to include matters outside the agreement pending the conclusion of a Swedish arbitration.

of the Model Law.[81]

3.3.c. Composition of the Arbitral Tribunal

Chapter III of the Model Law recognises the parties' autonomy to decide the appointment, challenge and replacement of arbitrators. It confers on the parties the right to agree on the number and procedure of appointment and challenge of the arbitrators. The Model Law also contains saving or reserve provisions which provide suppletive rules in the event that the parties did not or were unable to agree on any of these issues.

Under Article 10 the parties are free to choose the number of arbitrators to form the arbitral panel. Although the parties are not bound to select any particular number, if they fail to agree the arbitral panel will be composed of three arbitrators.[82] Article 11(1) states that arbitrators shall not be precluded from appointment on grounds of their nationality unless otherwise agreed by the parties. In practice, the parties reverse this provision to the effect that nationality plays a central role in the appointment of arbitrators. The parties usually prefer to appoint their nationals to represent them in arbitration tribunals, although the umpire

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[81] See e.g., *No. 363 Dynamic Endeavours Inc.* v. *34718 B.C Ltd.* (1993) 81 B.C.L.R. (2d) 359 (B.C. C.A.) where the court held that an application by the defendant seeking discovery of documents against an application for an interim order freezing certain funds was only a response to that application and could not be regarded as taking a step in the proceedings as to estop the defendant applicant from requesting a stay of proceedings based on an arbitration agreement. In *Globe Union Industrial Corp.* v. *G.A.P. Marketing Corp.* (1995) 2 W.W.R. 696 (B.C. S.C.), the court held that G.A.P.'s filing of an appearance and a defensive response to Globe's application for an interlocutory injunction to restrain G.A.P. from proceeding with the arbitration did not constitute a step in the proceedings within the meaning of Article 8(1) of the Model Law. In contrast, see *ABN Amro Bank Canada* v. *Krupp Mak Maschinenbau GmbH* (1994) 21 O.R. (3d) 511 (Ont. Ct. G. D.) where the court held that a statement of defence cannot constitute a request for a stay of proceedings, because in filing pleading, a party cannot simultaneously deny the court's jurisdiction. Thus, the court held that the request for a stay of proceeding was not timely under Article 8 of the Model Law. Similarly, in *Queensland Sugar Corp.* v. *The "Hanjin Jedda"* (1995) 7 W.W.R. 237 (B.C.S.C.), the appellant brought an application requesting an order for arbitration when the parties had exchanged pleadings and the case set for trial, the court held that the application is out of time when proceedings are well under way. Application for a stay was also refused in *Ruhrkohle Handel Inter GmbH* v. *Fednav Ltd.* (1991) 49 F.T.R. 316 where the applicant had filed a defence and counterclaim.

[82] Model Law, *supra* note 3, Article 10(2).

arbitrator should come from a neutral state.[83]

The rest of Article 11 deals with the procedure for appointing the arbitral panel. If the parties fail to agree or the appointed arbitrators fail to agree on the appointment of a third arbitrator, then the parties may request the competent authority or court to make the appropriate order. Where any of the appointed arbitrators are removed by the parties or withdraw from office Article 15 provides that a substitute arbitrator shall be appointed under the same rules adopted for the appointment of the arbitrator that is being replaced.

3.3.d. Challenge of Arbitrators

Article 12(1) imposes a legal obligation on any person contacted for appointment as arbitrator to "disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence." This obligation continues throughout the course of the arbitral proceedings. Article 12(2) provides that failure to disclose such circumstance may justify as grounds for challenge of the arbitrator. If the parties had agreed that the arbitrators should possess certain qualifications,[84] Article 12(2) also allows for challenge when it appears that an arbitrator does not in fact possess such qualifications.

Article 13 provides that the parties are free to agree on the procedure for challenging an arbitrator. If the parties fail to agree, the same rules of procedure contained in Article 11 are repeated in Article 13. To prevent dilatory tactics, Article 13(3) provides that arbitration

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[83] See *Imperial Ethiopian Government* v. *Baruch-Foster Corp*, *supra* note 15 at 335. The arbitration agreement provides: the third arbitrator, ... shall not be a national of the Empire of Ethiopia or of the United States of America..."

[84] For example in *Baruch-Foster Corp*, *supra* note 15, the agreement provides that the arbitrators "shall be chosen from among judges, professors of law, or practising attorneys, admitted to practice before the highest court of the country of which they are nationals..."

proceedings shall continue notwithstanding that a request for a ruling on the challenge of an arbitrator is pending before the court.

3.3.e. Jurisdiction of the Arbitral Tribunal

The Model Law, under Article 16(1), incorporates one of the principles generally used in international commmercial arbitration, that is, empowering an arbitral tribunal with competence to rule on its own jurisdiction including the validity or existence of the arbitration agreement. The provision further provides that the validity of an arbitration agreement in a contract shall be considered separately from the validity of the contract. In other words, invalidity of the contract does not lead to the automatic conclusion that the arbitration clause is invalid. Article 16(1) thus introduces both the *kompetenz-kompetenz* principle which literally means "jurisdiction to decide jurisdiction",[85] and the autonomy of the arbitration clause.[86]

Article 16(2) states that a plea that the arbitral tribunal does not have or is exceeding its jurisdiction shall be raised promptly. Article 16(3) provides that a positive decision by the arbitral tribunal that it has jurisdiction may be challenged by judicial review "within thirty days after having received notice of that ruling." To avoid unnecessary delay, the arbitral proceedings shall continue during the course of the judicial review.[87]

It is important to note that the principle of *kompetenz-kompetenz* may be differently

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[85] William W. Park, "Text and Context in International Dispute Resolution" (1997) 15 Boston University International Law Journal 191 at 201.

[86] Roberk K. Paterson, *supra* note 55 at 118.

[87] UNCITRAL Model Law, *supra* note 3, Article 16(3).

applied by states adopting the Model Law. For example, while the Model Law obliges a party to raise a plea challenging the jurisdiction of the arbitral tribunal or its decision thereon promptly, the Swedish Act based on the Model Law allows the party to wait until the final award and see whether in general it is advantageous or disadvantageous before raising a challenge to the arbitral tribunal ruling.[88] Similarly, in France, Article 1458 of the *Nouveau Code de Procedure Civile*[89] provides that when a dispute has been referred to an arbitral tribunal, French courts must decline to hear the case until after an award has been rendered. It does not matter if an independent judicial examination would reveal that the arbitrators lacked the power to hear the case.[90]

In contrast, in Switzerland and in Germany, under their national abitration laws adopting the UNCITRAL Model Law, the courts, if requested, will verify the decision of an arbitral tribunal on its jurisdiction.[91] This approach which calls for prompt challenge of the arbitrators for non-conformity with the rules is preferable. The French and Swedish approach is counter-productive, since valuable time and resources may have been wasted by continuing with the arbitral proceeding.[92]

In this regard, the Hong Kong Court of Final Appeal in a recent case held that the

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[88] Frank-Bernd Weigand, "The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden" (1995) 11 Arbitration International 397 at 405. The party must however act in accordance with section 34(2) of the *Swedish Arbitration Act of 1999* [Sweden], SFS 1999:116.

[89] *Nouveau Code de Procedure Civile*, [N.C.P.C.] (1981).

[90] William W. Park, *supra* note 85 at 202.

[91] *Ibid.*

[92] Frank-Bernd Weigand, *supra* note 88 at 405.

failure of the defendant to raise objections promptly to the arbitral tribunal justified enforcement of the award. The court reiterated the principle that:

> a party wishing to rely on a non-compliance with the procedural rules [governing an arbitration] should do so promptly and not proceed with the arbitration regardless, keeping the point up his sleeve for later use.[93]

The *kompetenz-kompetenz* principle which also allows the arbitral tribunal to rule on the validity of the arbitration agreement often overlaps with the court's obligation to refer parties to an arbitration agreement to arbitration.[94] Recall that under Article 8(1) the courts may decline to order the parties to arbitration if the arbitration agreement is "null and void, inoperative or incapable of being performed."[95] Thus, on application for a stay of proceedings the courts must necessarily examine whether the arbitration agreement is valid.[96]

However, in *Rio Algom Ltd.* v. *Sammi Steel Co.*,[97] the court declined to interpret the arbitration agreement, holding that since the *kompetenz-kompetenz* principle gives the arbitrators the power to rule on their jurisdiction, the arbitrators should equally decide on whether an arbitration agreement is null and void.

This overlap, in my view, is not adverse to the power of the tribunal to rule on its own jurisdiction and the validity of arbitration agreements since such decision, in any case, may

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[93] See *Hebei Import and Export Corp.* v. *Polytek Engineering Co. Ltd.* (1999) 2 H.K.C. 202.

[94] See Robert K. Paterson, "Forging a New Judicial Attitude to International Commercial Arbitration in Canada: the UNCITRAL Model Law in Canadian Courts" (Paper presented at a Seminar on the Canadian Experience of Alternative Dispute Resolution by Korean Academy of Arbitration and Korean Association of Canadian Studies Seoul, Korea, November 29, 1997) at 17.

[95] See *Automatic Systems Inc., supra* note 80 at 265.

[96] Robert K. Paterson, *ibid* at 20 where he referred to the reasoning of the court in *The City of Prince George* v. *A.L. Sims Sons Ltd.* (1995) 9 W.W.R. 503 (B.C.C.A.).

[97] (1991) 47 C.P.C. (2d) 251 (Ont. Ct. Gen. Div.)

be subject to judicial review.[98] A finding by the court that the arbitration agreement is null and void is binding on the arbitral tribunal and obviates the need to proceed with the arbitration as the validity of the arbitration agreement is fundamental to the jurisdiction of the arbitral tribunal.[99]

3.3.f. Interim Awards

Article 17 of the Model Law provides that an arbitral tribunal is empowered, in the absence of contrary agreement by the parties, to grant provisional remedies. Similarly, Article 9 allows any of the parties to the arbitration agreement to request from the court interim judicial measures of protection. Such requests are not incompatible with the fact that the parties have agreed to arbitration.[100]

Although the Model Law is silent on this point, the grant of interim orders by courts is not incompatible with the exercise of such right by an arbitral tribunal. It is consistent with ensuring the efficacy of the arbitration process while preserving the availability of judicial relief that cannot be provided by the arbitrator.[101] For example, while the arbitral tribunal's authority is limited only to the arbitrating parties,[102] the court may issue an order which binds

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[98] See Model Law, *supra* note 3, Article 16(2).

[99] Alan Redfern & Martin Hunter, *supra* note 45 at 5.

[100] UNCITRAL Model Law, *supra* note 3, Article 9.

[101] Robert K. Paterson, *supra* note 94 at 30. See also *Trade Fortune Inc.* v. *Amalgamated Mill Supplies Ltd.* (1994) 89 B.C.L.R. (2d) 132 (B.C.S.Ct.)

[102] Michael F. Hoellering, " The UNCITRAL Model Law on International Commercial Arbitration" (1986) International Lawyer 327 at 335.

third parties.[103]

3.3.g. Conduct of Arbitral Proceedings

Under Chapter V, the Model Law introduces a number of rules which provide fundamental rights and safeguards to ensure compliance with due process and enhance the effectiveness of the arbitral process.[104] Article 18 unequivocally demands that the parties be treated equally and have a fair opportunity to present their case. This requirement is in conformity with the universal principle of fair hearing which:

> is, of course, indispensable in all systems of justice. Without it, there is denial of justice, and lack of due process of law, and no court could be expected to enforce the arbitral award.[105]

Compliance with this "*Magna Carta* of arbitral procedure"[106] is mandatory as its absence may be invoked as a ground for setting aside an award in the place where it is made or for refusal of recognition and enforcement of an award under Articles 34(2)(ii) and 36(1)(a)(ii) of the Model Law and a foreign award under Article V(1)(b) of the New York Convention.

In the remaining parts of Chapter V, the Model Law reaffirms its basic principle of party autonomy which allows the parties to agree freely on virtually all issues concerning the

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[103] See *Delphi Petroleum Inc.* v. *Derin Shipping and Trading Ltd.*, (1993) 73 F.T.R. 241 (Fed. Ct. of Canada) where the court held that it had jurisdiction to entertain a motion for an interim measure of protection securing the evidence of a particular individual who was a third party not involved in the dispute between the parties.

[104] Gerold Herrmann, *supra* note 67 at 19.

[105] H.M. Holtzman, "The Conduct of Arbitral Proceedings" in *International Council for Commercial Arbitration, UNCITRAL's Project for a Model Law on International Commercial Arbitration* (Netherlands, 1984) at 129 (referred to by Michael F. Hoellering, *supra* note 102 at 335).

[106] Gerold Herrmann, *ibid.*, at 19.

conduct of the arbitral proceedings. Article 19 enables the parties to elect general rules of procedure to be followed by the tribunal in the course of the arbitral proceedings and, failing such agreement, allows the tribunal to conduct the proceedings in the manner it considers appropriate. Similarly, Articles 20 and 22 allow the parties to determine the place of arbitration and to decide the language(s) to be used for the arbitral proceedings. If the parties fail to agree on any of these issues, the arbitral tribunal shall make the appropriate decisions.

Absent contrary intentions of the parties, Article 24 provides that the tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral arguments, or conduct proceedings purely on the basis of documents and other materials. If the nature of the dispute demands it, or any of the party so requests, an oral hearing may be conducted notwithstanding that the parties had agreed on only written proceedings. The rest of Article 24 guarantees the parties adequate notice of the hearing and access to documents and other information, including reports of experts.[107]

Article 23 states the basic requirements and the procedural details concerning the filing of the statements of claim and defence. It also allows for amendment of pleadings provided it will not lead to undue delay of the arbitral proceedings. The arbitral process shall not be suspended for non-appearance or failure to produce documentary evidence by one of the parties without sufficient cause. Article 25 therefore enables the arbitral tribunal to continue its proceedings and make its decision even if one of the parties fails to appear. In any event, the party must have received adequate notice of the hearing or request for

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[107] Model Law, *supra* note 3, Article 24(3).

production of evidence.[108]

If the arbitral tribunal considers it necessary, and in the absence of contrary agreement by the parties, Article 26 allows the tribunal to appoint expert(s), and the parties may question the experts and/or produce expert witnesses of their own. Also, Article 27 provides that the tribunal, or any party with the tribunal's approval, may petition the court for assistance in taking evidence. Under this provision, the court would be able to assist the tribunal in compelling attendance of witnesses or enforce other orders relating to evidence, such as production of documents.[109]

Where these fundamental issues have been agreed on by the parties or, failing agreement, by the arbitral tribunal, it effectively precludes the application of any other arbitration law, code of civil procedure or national rules of evidence, except to the extent agreed by the parties. This approach is:

> particularly conducive to facilitating international commercial arbitration and allows the actual conduct of the proceedings to be tailored to the unique features of the 'transnational' and often 'trans-systemary' case at hand. ... To be forced to apply the 'law of the land' where the arbitration happens to take place could present a major disadvantage to any party used to a different system of evidence. Of course, this flexibility also allows the procedures of the legal system of that place to be strictly followed. The important difference is that this is then not by virtue of an imposed law but by choice.[110]

3.3.h. The Arbitral Award and Termination of Arbitral Proceedings

Article 28 deals with the substantive law applicable to the resolution of the dispute.

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[108] Gerold Herrmann, *supra* note 67 at 22.

[109] *Ibid.*

[110] *Ibid.*, at 20.

It recognises the parties' autonomy to choose the substantive "rules of law" applicable to their dispute. The reference to "rules of law" has been interpreted as not limiting the parties to one set of laws, but rather it leaves the parties:

> with a wide range of options and [the parties] may, for example, designate as applicable to their case rules of more than one legal system, including rules which have been elaborated on the international level.[111]

If the parties fail to agree on the law to govern the merits of the dispute, the arbitral tribunal shall choose the law based upon the conflict of laws rules which it considers applicable.[112] The restriction on the arbitral tribunal, requiring it to apply the conflict of laws rules, provides the parties with some degree of certainty as to what law the arbitral tribunal will apply in the event that the parties fail to make a choice of law.[113] However, some domestic arbitration laws such as the *Alberta International Commercial Arbitration Act* give more leeway to the arbitrators beyond the provisions of Article 28(2) of the Model Law.[114]

Alternatively, Article 28(3) states that if the parties so authorise, the arbitral tribunal shall decide the dispute *ex aequo et bono* or as *amiable compositeur*. This type of arbitration authorises the arbitral tribunal to abate the strictness of the law in favour of what is just and

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[111] Gerold Herrmann, *supra* note 67 at 22.

[112] UNCITRAL Model Law, *supra* note 3, Article 28(2).

[113] See *United Nations Commission on International Trade Law, Report of the Secretary-General, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, U.N. Doc. A/CN.9/264 (1985) at 62 (hereinafter UNCITRAL Analytical Commentary).

[114] See Article 7 of the *Alberta International Commercial Arbitration Act*, S.A., 1986, c.1-6.6 which provides that "notwithstanding article 28(2) of the International Law, if the parties fail to make a designation pursuant to article 28(1) of the International Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute."

good in accordance with equity and good conscience,[115] but it is rarely used.

Article 28(4) provides that in all cases the arbitral tribunal must decide the case in accordance with the terms of the contract and shall take into account trade usages. This provision is seen as a stimulant for the parties' agreement to arbitrate their dispute as the parties, "not without good reason, expect from arbitrators that they will above all base their decision on the wording and history of the contract and the usages of trade."[116]

Article 29 provides that, while the award and other decisions must be made by a majority of all arbitrators, if the parties or the arbitrators agree, questions of procedure may be left to a presiding arbitrator. Also, by virtue of Article 31, arbitral awards, whether made by a single arbitrator or an arbitral panel, must be in writing and signed by the arbitrator or a majority of the arbitral panel. The award must contain the reasons on which it is based, unless otherwise agreed by the parties.[117] Article 30 also recognises that during arbitral proceedings the parties may opt for settlement of their disputes. The terms of settlement may be adopted as the tribunal's award if so requested by the parties and not objected to by the arbitrators.[118]

Article 32 states that the mandate of the arbitral tribunal shall terminate on withdrawal of the claim, settlement, the making of a final award, or by agreement of the parties or the arbitral tribunal. Article 33, however, provides that such termination is without prejudice to

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[115] See *Black's Law Dictionary*, 6th ed., (United States: West Publishing Co., 1990) at 82; 557.

[116] See *U.S. Government Comments on the UNCITRAL Working Group Draft Text of a Model Law on International Commercial Arbitration*, cited by Michael F. Hoellering, *supra* note 102 at 337.

[117] Model Law, *supra* note 3, Article 31(2).

[118] Model Law, *ibid.*, Article 30(2).

the right of any of the parties to request the arbitral tribunal, within thirty days from receipt of the arbitral award, for interpretation of any particular part of the award or for correction of any facial errors. The arbitral tribunal may similarly on its own within the stated time effect such correction.

3.3.i. Recourse Against Awards

The New York Convention provides that recognition and enforcement of an award may be denied if the award has been set aside in the place or country where the award was made. However, the Convention does not provide the grounds for setting aside an award.[119] To prevent a situation where an arbitral award is subjected to varying attacks, Article 34(1) of the Model Law provides for exclusive direct attack of the award in the country or place where the award was made through an "application for setting aside."

Article 34(3) provides that the party against whom the award is made has three months from receipt of the award to apply to the court in the state where the award was made to have the award set aside. Article 34 (2)(a) & (b) contains the exclusive grounds for setting aside an award on the application of a party or *ex officio* by the court.[120] The grounds for setting aside an award are based on procedural fairness, arbitrability and public policy criteria.[121]

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[119] New York Convention, *supra* note 2, Article V(1)(e).

[120] The effect of a set aside award is discussed in detail in Chapter 4 below.

[121] These grounds are almost identical to those for recognition and enforcement of award stated in Article V of the New York Convention, *ibid.*, and repeated in Article 36 of the Model Law *supra* note 3. See Appendix 2 for extracts of the Model Law.

3.3.j. Recognition and Enforcement of Arbitral Awards.

Article 35 of the Model Law which provides for the requirements for recognition and enforcement of arbitral awards is modelled on the relevant provisions of the New York Convention.[122] Also, Article 36 contains the limited grounds for challenge and denial of recognition and enforcement of arbitral awards which are identical to those listed under Article V of the New York Convention and almost identical to the criteria in Article 34 of the Model Law.[123] Article 36(2) of the Model Law also replicated Article VI of the Convention which provides that the enforcing court may suspend enforcement proceedings if an application for setting aside an award is pending before the court in the place where the award was made. The rationale for this provision is to avoid concurrent judicial review and the possibility of conflicting decisions.[124]

Although the Model Law reproduced the provisions of the Convention with respect to the recognition and enforcement of awards, the Model Law, however, does not expressly permit states to require reciprocity for the recognition or enforcement of arbitral awards.[125] It has left such a decision to the discretion of each state.[126]

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[122] See the New York Convention, *supra* note 2, Articles III & IV.

[123] The grounds for challenge of recognition and enforcement of awards is discussed in detail in Chapter 4 below. See also Appendix 2.

[124] See Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, *supra* note 112 at 79.

[125] See Article I(3) of the New York Convention, *supra* note 2 a contracting state may limit its recognition and enforcement of arbitral awards under the Convention only to awards made in the territory of another contracting state.

[126] Petar Sarcevic, *supra* note 64 at 195.

3.4. COMMENTARY

The text of the New York Convention deals specifically with the recognition and enforcement of foreign arbitral awards. The provision on the form and enforcement of arbitration agreements was a last minute consideration and addition. It was, however, a timely decision as the arbitration agreement represents the parties' consent to arbitrate their dispute. It was therefore necessary to provide for its form and enforcement in an instrument that focuses on the recognition and enforcement of awards resulting from such agreements. The Model Law offers improvements on the writing requirement for arbitration agreements. It also confers on an arbitral clause in a contract a separate legal validity distinct from the contract.

Furthermore, the coverage of the Model Law extend to rules of arbitral proceedings as well as recognition and enforcement of arbitral awards. These provisions parallel those in the New York Convention. Although it was generally recognised that the New York Convention contains substantive provisions for the recognition and enforcement of foreign arbitral awards, the prevailing view which informed the repetition of these provisions in the Model Law was that the Model Law would be incomplete without the provisions on the recognition and enforcement of arbitral awards.[127]

Also, it was envisaged that the inclusion of these provisions in the Model Law would create a uniform treatment of all awards irrespective of their country of origin. Accordingly, the Model Law made improvements to the Convention, to include the recognition and enforcement of arbitral awards in international commercial arbitration whether or not the

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[127] Gerold Herrmann, *supra* note 67 at 26.

award was made in the enforcing state.[128]

The Model Law also streamlined the grounds for setting aside an arbitral award. It adopted similar grounds in Articles 34 and 36, in an attempt to avoid the problem of "split validity", a situation where an award may be declared invalid in the state of origin but valid and enforceable abroad.[129] Pursuant to Article 34, a party who has not moved to set aside the award in the place where it was made in a timely manner is, however, not foreclosed from raising defences to recognition and enforcement of that award at the enforcement stage.[130]

However, the application of the public policy and nonarbitrability provisions in Article 34(2)(i) & (ii) which can be applied *ex officio* by the courts to set aside or refuse recognition of an award may be quite different in substance depending on the state in question.[131] In this respect, a party may prefer to resist enforcement of an award against its assets in the courts of its home state where the enforcement proceedings may be sought, instead of applying to have the award set aside in the country of origin of the award "if he feels that the courts of his country will interpret more liberally, than the courts where the award was made, a ground for contesting the award (for example, public policy or nonarbitrability provisions)."[132]

It is, however, a positive development that the grounds for setting aside an award in the place where it was made have been outlined by the Model Law. Also, by adopting the

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[128] Gerold Herrmann, *supra* note 67 at 27.

[129] See McNerney & Esplugues, *supra* note 60 at 54.

[130] See *Report of the United Nations Commission on International Trade Law on the Work of its Eighteen Session*, *supra* note 63 at 54, para. 274.

[131] *Ibid.*, at 25.

[132] Robert K. Paterson, *supra* note 55 at 121.

grounds for recognition and enforcement of arbitral awards as conta' ıed in the Convention, the Model Law has achieved a unified means of proceedings for setting aside awards and resisting enforcement while preserving the achievements of the New York Convention.[133]

The impact of the Model Law is already having effect in about twenty-eight countries, eight states in the United States, and Scotland in Great Britain.[134] These states have adopted national arbitration laws based on the Model Law.[135] However, this number is still minimal compared with the 121 contracting states to the New York Convention. Thus, the New York Convention remains the most widely used instrument in the recognition and enforcement of arbitral awards. This notwithstanding, it has been noted that the Model Law supplements the New York Convention to ensure effective recognition and enforcement of arbitral awards in those countries and states that have adopted it.[136]

The application of the New York Convention and the Model Law by the U.S. and Canadian courts in the enforcement of arbitral awards will be considered in Chapter 4. Although Canada is a contracting state to the New York Convention, it has adopted federal and provincial arbitration laws using the Model Law. Thus, Canadian courts mainly rely on the domestic "model law" statutes in deciding arbitration cases. On the other hand, while some states in the United States have adopted state arbitration laws based on the Model Law,

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[133] Petar Sarcevic, *supra* note 64 at 195.

[134] See Daniel M. Kolkey, "It's Time to Adopt the UNCITRAL Model Law on International Commercial Arbitration" (1998) 8 Transnational Law and Contemporary Problems 3 at 13.

[135] It should also be noted that other states such as England have modified their national arbitration laws which is influenced by the Model Law.

[136] Gerold Herrmann, *supra* note 67 at 26.

since the Model Law has not been adopted at the federal level, U.S. courts decide arbitration cases with reference to the New York Convention. As will be seen in Chapter 4, this does not present any difficulty, largely due to the fact that the provisions on the recognition and enforcement of the award are the same under both instruments.

Chapter 4

ENFORCEMENT AND CHALLENGE OF ARBITRAL AWARDS

4.1. INTRODUCTION

Enforcement of arbitral awards is central to the continued effectiveness of arbitration as a mechanism for settlement of international commercial disputes. It is estimated that a majority of arbitral awards are executed freely by the parties themselves.[1] The losing party voluntarily complies with the arbitral award either out of good faith or because its commercial reputation is at stake.[2]

However, as arbitration becomes a generalised means for the settlement of international commercial disputes, such moral norms which may be sufficient to ensure respect for arbitral awards are no longer adequate to guarantee compliance with arbitral awards.[3] This is because the parties may have no prior relationship other than the contract which is the subject matter of the dispute. Thus, there is the possibility that one of the parties may on some occasions decline to comply with the award. At this point, the successful party must seek external authority to enforce a losing party's obligation and to collect the damages

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[1] See Petar Sarcevic, "The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law" in Petar Sarcevic, ed., *Essays on International Commercial Arbitration* (London: Graham & Trotman/Martinus Nijhoff, 1989) 177 at 191 where he noted that about 94% of the awards of the International Chamber of Commerce are executed without enforcement proceedings, while only 6% of the awards are contested before State jurisdiction, and only 0.5% are set aside. See also Pierre Lalive, "Enforcing Awards" in ICC International Court of Arbitration, *60 Years of ICC Arbitration: A Look at the Future*, ed., (France: ICC Publishing S.A., 1984) 317 at 319.

[2] Paolo Contini, "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1959) 8 American Journal of Comparative Law 283 at 309. This is especially in the case of arbitration under the auspices of a specialised arbitral institution between members of a close-knit trade or professional group. Their expectation is that the contractually chosen procedure will be definitive and will replace all recourse to courts.

[3] Laurence W. Craig, "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration" (1995) 30 Texas International Law Journal 1 at 8.

awarded.[4]

Since arbitral awards are not self executing, there must be legal means of guaranteeing their execution.[5] In the absense of such legal framework, resort to arbitration is likely to be unattractive as arbitral awards issuing from that process will be worthless. In this respect, a number of international treaties, national arbitration laws and other legal instruments contain rules which regulate the recognition and enforcement of arbitral awards. As a matter of course, enforcement provisions are included in any effective set of arbitral rules.[6] Both the New York Convention[7] and the UNCITRAL Model Law[8] devote a great deal of attention to ensuring comity between states and their nationals in the enforcement of arbitral awards.[9]

The general view is that the New York Convention was concluded with the intention that the winning party in an arbitration proceeding should not be faced with insuperable obstacles when it seeks to have the award enforced.[10] The UNCITRAL Model Law shares this objective. It provides complementary provisions on the recognition and enforcement of

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[4] Joseph T. McLaughlin, "Enforcement of Arbitral Awards under the New York Convention: Practice in U.S. Courts" (1988) 477 Practising Law Institute/Commercial Law & Practice 275 at 278; Elisabeth M. Senger-Weiss, "Enforcing Foreign Arbitral Awards" (1998) 53 Dispute Resolution Journal 70 at 72.

[5] Petar Sarcevic, *supra* note 1 at 192.

[6] Michael Durgavich, "Resolving Disputes Arising out of the Persian Gulf War: Independent Enforceability of International Agreements to Arbitrate" (1991-1992) 22 California Western International Law Journal 389 at 401.

[7] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, U.N. Doc. E/CONF. 26/9/Rev. 1, reprinted in 330 U.N.T.S. 38 (hereinafter the New York Convention or Convention).

[8] *UNCITRAL Model Law on International Commercial Arbitration*, UN. Doc. A/40/17 (1985), reprinted in (1985) 21 I.L.M. 1302 (hereinafter the Model Law).

[9] Michael Durgavich, *supra* note 6 at 401.

[10] Paolo Contini, *supra* note 2 at 309.

arbitral awards modelled on the New York Convention.[11] The Convention and the Model Law, therefore, contribute to a unified framework for fair and equitable settlement of international arbitral disputes.[12]

In practice, the party seeking enforcement of an award needs to locate the state or states where the losing party has assets sufficient to satisfy the award.[13] If the assets are available in one state, the party seeking enforcement of the award will have no choice but to commence enforcement proceedings in that state. Where there is a choice, that is, if the losing party has assets in more than one country, the party seeking enforcement of the award will be able to go "forum-shopping",[14] and the enforcing party must decide in which of the state(s) it will bring enforcement proceedings.

It is important in selecting a forum for the enforcement of an award to consider the extent to which the prospective forum is linked to the country of origin of the award, for example, whether both states are parties to the New York Convention or have enacted the UNCITRAL Model Law. It is also imperative to consider the perceived attitude of the national courts in a potential enforcing forum to requests for recognition and enforcement of foreign arbitral awards.[15] This is because the national courts play a pivotal role in the

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[11] Petar Sarcevic, *supra* note 1 at 192.

[12] Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Deventer: Kluwer Law & Taxation Publishers, 1989).

[13] Alan Redfern & Martin Hunter, *International Commercial Arbitration* (London: Sweet & Maxwell, 1986) at 338.

[14] *Ibid.*

[15] *Ibid.*

enforcement of arbitral awards. Thus, it has been observed that the effectiveness of international arbitration is inevitably dependent on the assistance of the national courts of contracting states to the Convention. Therefore, the manner in which the courts interpret and apply the Convention or the Model Law determines its effectiveness.[16]

The Convention and the Model Law, while providing liberal requirements for the recognition and enforcement of arbitral awards, also contain grounds for challenge to recognition and enforcement. Also, the Convention and the Model Law provide that arbitral awards may be set aside or suspended in the country of origin and that this may suffice as a ground to refuse the recognition and enforcement of the award in another country.[17] In addition, the Model Law complements this provision by containing limited grounds that may justify the setting aside or suspension of arbitral awards.[18]

In effect, arbitral awards may be set aside, suspended or denied recognition and enforcement if successfully challenged by the losing party. Also, the court where or under whose law the award was made may set aside or suspend the award. Similarly, the enforcing court may also on its own cognisance refuse the recognition and enforcement of the award.

This chapter examines the provisions of the New York Convention and the UNCITRAL Model Law on the recognition and enforcement of arbitral awards covered by both instruments. It also examines the impact of an award that has been set aside in its

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[16] Albert Jan van den Berg, *The New York Convention of 1958* (Deventer: Kluwer Law and Taxation Publishers,1981) at 5.

[17] See New York Convention, *supra* note 7, Article V(1)(v) and Model Law, *supra* note 8, Article 36(1)(a)(v).

[18] Model Law, *ibid.*, Article 34(1). The provision essentially duplicates the grounds for challenge of the recognition and enforcement of arbitral awards. Its importance is in streamlining the circumstances that may justify the setting aside or suspension of arbitral awards.

country of origin. As a guide, the study focuses on United States and Canadian courts' interpretations of the grounds for challenge of arbitral awards contained in the Convention and the Model Law. Both the United States and Canada are parties to the New York Convention and have domestic laws implementing the provisions of the Convention. In addition, Canada has enacted federal and provincial arbitration laws based on the UNCITRAL Model Law. With respect to the two countries, most cases on the application of the New York Convention come from U.S. courts, while Canadian courts supply most decisions on the application of the UNCITRAL Model Law.

4.2. UNITED STATES ACCESSION TO THE NEW YORK CONVENTION

Historically, United States courts were hostile toward arbitration, expressing the view that extrajudicial attempts to resolve disputes tended to oust their jurisdiction.[19] This attitude changed in 1925 with the adoption of the *Federal Arbitration Act* (hereinafter FAA).[20] The FAA was designed to promote arbitration of domestic commercial or contractual agreements and to make such agreements enforceable within the country.[21]

The U.S. acceptance of the arbitration process was, however, not extended to international arbitration. For example, the United States was never a signatory to the *Geneva Protocol on Arbitration Clauses of 1923*[22] and the *Geneva Convention on Execution of*

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[19] Jill A. Pietrowski, "Enforcing International Commercial Arbitration Agreements - Post- Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc." (1986) 36 American University Law Review 57 at 61-62.

[20] *Federal Arbitration Act*, 9 U.S.C., c.1, ss.1-16.

[21] FAA, *ibid.*, s. 2.

[22] *Geneva Protocol of 1923*, 27 L.N.T.S. 158.

Foreign Arbitral Awards.[23] Also, although the United States participated at the Conference concluding the 1958 New York Convention, the U.S. representatives at the Conference advised against the adoption of the Convention.[24] Four main reasons were stated to support the recommendation.[25]

However, in 1970, following changes in the U.S. legal attitude toward arbitration,[26] the United States expressed its commitment to international commercial arbitration by becoming a contracting party to the New York Convention.[27] The U.S. ratified the Convention by adding a new chapter to the FAA that implements the provisions of the New York Convention.[28]

The rationale for the adoption of the New York Convention by the U.S. was succinctly stated by the U.S. Supreme Court in *Scherk* v. *Alberta-Culver Co.*[29] as follows:

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[23] *Geneva Convention of 1927*, 92 L.N.T.S. 301.

[24] Leonard V. Quigley, "Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1960-61) 70 Yale Law Journal 1049 at 1074.

[25] See Leonard V. Quigley, *ibid.*, at 1075 where he summarized the reasons as follows:

(1) The Convention, if accepted on the basis that it avoids conflict with State laws and judicial procedures, will confer no meaningful advantages on the United States.

(2) The Convention, if accepted on a basis that assures such advantage, will over-ride the arbitration laws of a substantial number of States and entail changes in State and possibly Federal court procedures.

(3) The United States lacks a sufficient domestic legal basis for acceptance of an advanced international convention on this subject matter.

(4) The Convention embodies principles of arbitration law which it would not be desirable for the United States to endorse.

[26] Stanley L. Levine, "United Nations Foreign Arbitral Awards Convention: United States Accession" (1971) 12 California Western International Law Journal 67 at 68.

[27] Jill A. Pietrowski, *supra* note 19 at 63.

[28] FAA, *supra* note 20, c.2, ss. 201-208.

[29] 417 U.S. 506 (1974).

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.[30]

4.2.a. Application of the New York Convention Under the Federal Arbitration Act

While Chapter 1 of the FAA applies to domestic awards, Chapter 2 covers foreign (Convention) awards. In order to determine when Chapter 2 of the FAA is applicable, it is important to examine what is meant by "foreign" arbitral awards.

Article I(1) of the New York Convention provides that foreign awards under the Convention (FAA, Chapter 2) refer to arbitral awards made in the territory of another state. In addition, it includes arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.[31] Arbitral awards within the first part of Article I(1) of the Convention can easily be determined. But the question what constitutes a non-domestic award within the meaning of the New York Convention is "one of the most complicated issues posed by the treaty."[32]

What constitutes a foreign award under the FAA was addressed in *Bergesen* v. *Joseph Muller Corp.*[33] In that case, the court held that an arbitral award made in the United States between two foreign parties (a Swiss corporation and a Norwegian shipowner) was a non-

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[30] *Scherk* v. *Alberta-Culver Co*, *supra* note 29 at 520.

[31] New York Convention, *supra* note 7, Article I(1).

[32] Albert Jan van den Berg, "When is an Arbitral Award Non-domestic under the New York Convention of 1958?" (1985) 6 Pace Law Review 25 at 26.

[33] 710 F. 2d 928 (2d Cir. 1983).

domestic award within the meaning of the Convention and, thus, the provisions of Chapter 2 of the FAA were applicable.[34] In reaching this conclusion, the court broadly construed the Convention and its implementing federal statute to effectuate the purpose of the legislation, noting that:

> it would be anomalous to hold that a district court could direct two aliens to arbitration within the United States under the statute, but that it could not enforce the resulting award under the legislation which, in large part, was enacted just for that purpose.[35]

The court was of the opinion that where neither party to an arbitration proceeding is a U.S. national, the resulting arbitral award is "non-domestic."[36] But an arbitration held within the United States between U.S. nationals qualifies as a domestic award.[37] The decision in *Bergesen* has been favourably applauded by commentators.[38]

However, the court's interpretation of non-domestic awards has been criticised as

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[34] *Bergesen, supra* note 33 at 932. Remarkably the arbitration clause provided expressly that "the arbitration ... shall be governed by the Laws of the state of New York."

[35] *Ibid.*, at 933.

[36] Daniel M. Kolkey, "Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations" (1988) 22 International Lawyer 693 at 714.

[37] See FAA, c.2, *supra* note 28, s. 202 which states that "an award ... which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." But see *Lander Co.* v. *MMP Investments Inc.* 927 F. Supp. 1078 at 1079 (N.D.Ill. 1996) which raised the issue of whether a contract provision requiring performance in a foreign country brought an arbitration award between two U.S. companies, and rendered in the United States, within the terms of the Convention. The court held that the language of section 202 of the FAA may not be interpreted to expand the scope of the Convention, contending that "such an interpretation would create an inconsistency between the accession declaration of the United States and the implementing language of section 202 of Article 9."

[38] See William Phillips, "Recognition of Foreign Arbitral Awards: The Second Circuit Provides a Hospitable Forum" (1984) 10 Brooklyn Journal of International Law 489, Mark B. Feldman, "An Award made in New York can be a Foreign Arbitral Award" (1984) 39 Arbitration Journal 14.

going beyond the legislative history of the Convention.[39] Dr. van den Berg has argued that a proper interpretation of the Convention suggests that the conventional approach for determining non-domestic awards refers to awards made in the enforcing state under foreign laws.[40] Although Dr. van den Berg faulted the basis of the court's decision, he identified with the purposeful direction of the court's conclusion. Thus, he observed:

> The reason the court ... preferred the "broader construction" was that "it is more in line with the intended purpose of the treaty." The court described the purpose as being "to encourage the recognition and enforcement of international arbitration awards." One cannot but approve this reason. Whether the "broader construction" can be based on a reading of the second criterion in isolation, however, needs further examination."[41]

The broader construction of a non-domestic award in *Bergesen* has been followed in the recent case of *Yusuf Ahmed Alghanim & Sons* v. *Toys "R" US, Inc.*[42] Although the case involved two non-domestic parties and one United States corporation, the court nevertheless held that, since the relationship principally involved conduct and contract performance in the Middle East, the resultant award was a non-domestic award and thus within the scope of the Convention.[43] In *Lander Co., Inc.* v. *MMP Investments, Inc.*,[44] the parties were American

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[39] Albert Jan van den Berg, *supra* note 32 at 46.

[40] *Ibid.*, at 43.

[41] *Ibid.*, at 46-47.

[42] 126 F. 3d 15 (2nd Cir. 1997). See also *Seven Seas Shipping (UK) Ltd.* v. *Tondo Limitada*, West Law 435149 (S.D.N.Y. 1999).

[43] *Ibid.*, at 19. In *Jain* v. *De Mere*, 51 F. 3d 686, 689 (7th Cir. 1995), cert. denied, U.S. 116 S.Ct. 300 (1995), the court held that "any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention."

[44] 107 F. 3d 476 (7th Cir. 1997).

firms that made a contract for the distribution by MMP in Poland of shampoos and other products manufactured by Lander in the United States. Although the relationship was entirely between U.S. citizens, the 7th Circuit Court of Appeals reversed the decision of the District Court,[45] holding that since the contract involved performance abroad, the award was covered under the New York Convention.[46]

If an award is considered a Convention award, section 207 of the FAA provides that the successful party must apply for confirmation of the award within three years of obtaining it.[47] In contrast, section 9 of the FAA states that a party seeking confirmation of domestic awards must commence the action within one year.[48] This was one of the remarkable implications of the *Bergesen* case. At the time of filing the petition on December 10, 1981, for confirmation of the award (which was made on December 14, 1978), the applicant had only four days remaining before the three year time limit elapsed. If the court had held that the award was a domestic award, the statute of limitation for domestic awards would have barred the petitioner from confirming the award.[49]

Another distinction between a "domestic" and "foreign" award is determining which court has jurisdiction to enforce the award. Section 9 of the FAA states that if an "entry of

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[45] *Lander Co.* v. *MMP Investments*, 927 F. Supp. 1078 (N.D.Ill. 1996).

[46] *Lander Co.* v. *MMP Investments*, (C.A.), *supra* note 44 at 482.

[47] FAA, c. 2, *supra* note 28, section 207.

[48] FAA, c. 1, *supra* note 20, section 9.

[49] See *Bergesen* v. *Joseph Muller Corp.*, *supra* note 33 at 930, Albert Jan van den Berg, *supra* note 32 at 29.

judgment clause"[50] is not contained in an arbitration agreement, a federal court has no jurisdiction to enforce a domestic award. In contrast, section 205 of the FAA provides that United States federal district courts shall have original jurisdiction over actions arising under the Convention "regardless of the amount in controversy."[51]

However, the jurisdictional grant is "original" and not "exclusive", thus permitting state courts to entertain actions falling under the Convention.[52] But the jurisdiction of state courts is subject to the removal provision of section 205.[53] In such event, the three year time limit for confirmation of awards falling under the Convention will apply, instead of the usual one year time limit for confirmation of domestic awards in the state district courts.[54]

Concerning whether section 208 of the FAA[55] requires the inclusion of an entry of "judgment clause" in international arbitration agreements, it was observed that:

> if this requirement was to apply to an international Convention arbitration, the results would be difficult to explain to a foreign party. An international business entity enters into an arbitration agreement with the confidence that the U.S. is a member in good standing of the countries acceding to the

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[50] Pursuant to FAA, c.1, *supra* note 20, s. 9, domestic arbitration clauses must indicate mutual consent to the entry of judgment on the award before a federal district court has jurisdiction to confirm an award. This is usually indicated by inserting an express provision in arbitration agreement that "judgment upon the award may be entered in any court having jurisdiction hereof." See Jan van den Berg, *supra* note 16 at 242.

[51] FAA, c. 2, *supra* note 28, section 203.

[52] Gerald Aksen, "Application of the New York Convention by United States Courts", in Pieter Sanders, ed., *Yearbook Commercial Arbitration*, Vol. IV (Deventer: Kluwer Law & Taxation Publishers, 1979) 341 at 345.

[53] FAA, c. 2, *ibid.*, section 205 provides that where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant, [but not the plaintiff], may before the trial, remove the case from a state to federal court.

[54] Martin Domke, "The United States Implementation of the United Nations Arbitral Convention" (1971) 19 American Journal of Comparative Law 575 at 582.

[55] The section provides that "Chapter 1 applies to actions and proceedings brought under this Chapter [2] to the extent that Chapter [1] is not in conflict with this Chapter or the Convention as ratified by the United States."

> Convention on the Recognition and Enforcement of Foreign Arbitral Awards. ... if the U.S. district courts are unavailable for implementing the treaty because the contract doesn't contain the 'magic language' specifying that 'judgment of the court shall be entered upon the award' required by Chapter 1 of the U.S. Arbitration Act, an anomalous and detrimental result might follow.[56]

In ratifying the New York Convention, the United States availed itself of the reciprocity and commercial reservations provisions.[57] However, the U.S. courts have narrowly construed these reservations. In *Fertilizer Corp. of India* v. *IDI Management, Inc.*,[58] the defendant requested the court to refuse enforcement of the award, among other grounds, on the basis of reciprocity. The defendant claimed that though India is a party to the Convention, it had "adopted various evasive devices ... to avoid enforcement of awards adverse to Indian parties."[59] The court rejected this argument holding that the reciprocity reservation envisaged by the New York Convention required only that India be a signatory to the Convention.[60]

The scope of the "commercial" reservation has been narrowly defined while expanding the meaning of commercial transactions under section 202 of the implementing legislation.[61]

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[56] Gerald Aksen, *supra* note 52 at 357.

[57] Article I(3) of the New York Convention, *supra* note 7 provides:
when signing, ratifying, or acceding to this Convention, any state may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

[58] 517 F. Supp. 948 (S.D. Ohio. 1981).

[59] *Ibid.*, at 952.

[60] *Ibid.*, at 953.

[61] FAA, c.2 *supra* note 28, s.202 provides: an arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in section 2 of this title, falls under the Convention. Thus, FAA sect. 2 brings "maritime transactions and contracts evidencing a transaction involving commerce" within the scope of the Convention.

In *Sumitomo Corp.* v. *Parakopi Compania Maritima*,[62] the plaintiff (a Japanese corporation) brought an action in a U.S. District Court to compel the defendant (a Panamanian corporation) to abide by the arbitration clause in their ship construction contract. The defendant challenged the jurisdiction of the District Court, claiming that because both parties were foreign to the United States the dispute was not a "commercial" transaction under the U.S. law.[63] The court disagreed with the defendant's argument. It observed that, although the provisions of Chapter 1 of the FAA may be applied to Chapter 2,[64] the definition of "commerce" under Chapter 1 could not be applied to limit the application of the Convention. The court opined that:

> to hold that subject matter jurisdiction is lacking where the parties involved are all foreign entities would certainly undermine the goal of encouraging the recognition and enforcement of arbitration agreements in international contracts.[65]

In an earlier case, *Island Territory of Curacao* v. *Solitron Devices, Inc.*,[66] the defendant argued that a contract which involved performing a governmental act was not a commercial relationship.[67] The court was not persuaded by this argument. It held that the

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[62] 477 F. Supp. 737 (S.D. N.Y. 1979).

[63] FAA, c.1, *supra* note 20, s. 1 defines "commerce" as: commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or territory or foreign nation.

[64] See FAA, c.2, *supra* note 28, s.208.

[65] *Sumitomo Corp.*, *supra* note 62 at 741.

[66] 356 F. Supp. 1 (S.D.N.Y. 1973).

[67] *Ibid.*, at 13. The contract was for the construction and maintenance of an electronics plant on behalf of the sovereign nation of Curacao (the plaintiff). When a dispute arose because of a change in the Island's minimum wage scale, Solitron discontinued performance and the issuing arbitration went in favour of Curacao.

contract was clearly commercial and further opined that the only awards falling outside the meaning of that term are "matrimonial and other domestic relations awards, political awards, and the like."[68]

The court's application of the reciprocal and commercial reservations, as indicated in the above cases, has not provided a formula for parties to subvert the broader goals underlying the Convention. Thus, the reservations have not narrowed the scope of the Convention in the United States.[69]

4.3. CANADA'S ACCESSION TO THE NEW YORK CONVENTION AND ADOPTION OF THE UNCITRAL MODEL LAW

Canada was one of the last western states to accede to the New York Convention, but was the first nation to reform its international arbitration laws on the basis of the UNCITRAL Model Law.[70] Due to the fact that Canada was not a signatory to the New York Convention until May 12, 1986, its domestic laws had been unfriendly to international arbitration.[71] The Model Law served as a basis for international arbitration legislation in Canada. The federal Parliament enacted two separate federal statutes which implemented the text of the New York

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[68] *Island Territory of Curacao*, *supra* note 66 at 13-14.

[69] Joseph T. McLaughlin, *supra* note 4 at 284.

[70] See Robert K. Paterson, "Forging a New Judicial Attitude to International Commercial Arbitration in Canada: the UNCITRAL Model Law in Canadian Courts" (paper presented at a Seminar on the Canadian Experience of Alternative Dispute Resolution, organised by Korean Academy of Arbitration and Korean Association of Canadian Studies Seoul, Korea, on November 29, 1997) 1. See also Linda C. Reif, "Recent Developments in International Economic and Business Law" (1991) 2 Canadian Bar Association 805 at 852.

[71] Edward C. Chiasson, "Canada: No Man's Land no More" (1986) 3 Journal of International Arbitration 67.

Convention[72] and adopted the UNCITRAL Model Law.[73]

The two Canadian territories and ten provinces have also enacted legislation implementing the New York Convention and adopting the UNCITRAL Model Law. Ontario enacted a single statute which adopts the Model Law and implements the New York Convention appended as a schedule to the statute.[74] British Columbia enacted two separate statutes, one implementing the Convention and the other adapting the provisions of the Model Law, and Quebec modified provisions of its Civil Code and Code of Civil Procedure that relate to arbitration in general.[75] The Quebec statute refers to the Model Law and the Convention as supplementary sources only, since most of the provisions of these instruments are incorporated in the Code by virtue of the modification.[76]

In Alberta,[77] as well as the other jurisdictions, the New York Convention and the Model Law were adopted in one statute in the form of a schedule at the end of a short enactment.[78] Although some of the provinces adopted the Model Law with some

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[72] *United Nations Foreign Arbitral Awards Convention Act*, S.C. 1986, c. 21.

[73] *Commercial Arbitration Act*, S.C. 1986, c. 22 (the Model Law is contained in the Commercial Arbitration Code set out in a schedule to the Act [hereinafter the Code]).

[74] *International Commercial Arbitration Act*, R.S.O. 1990, c. 1.9. The Act repeals the *Foreign Arbitral Awards Act*, S.O. 1986, c. 25.

[75] See British Columbia *International Commercial Arbitration Act*, S.B.C. 1986, c. 14, and Quebec, *An Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration*, S.Q. 1986, c. 73.

[76] J.G. Castel, A. deMestral, & W. Graham, *The Canadian Law and Practice of International Trade*, 2d ed., (Toronto: E. Montgomery Publications, 1997) at 725.

[77] See *International Commercial Arbitration Act*, S.A. 1986, c. 1-6.6 which implements the New York Convention and enacts into law the UNCITRAL Model Law.

[78] For a list of the federal and provincial legislation, see William C. Graham, "The Internationalization of Commercial Arbitration in Canada: A Preliminary Reaction" (1987-88) 13 Canadian Business Law Journal 2 at 3 (footnote 6).

modifications, and others with additions, the departures are not material.[79]

Reflecting on the essence of the legislative reforms of domestic arbitration laws in Canada, the court in *Schreter* v. *Gasmac Inc.*,[80] opined:

> The purpose of enacting the Model Law in Ontario and in other jurisdictions is to establish a climate where international commercial arbitration can be resorted to with confidence by parties from different countries on the basis that if the arbitration is conducted in accordance with the agreement of the parties, an award will be enforceable if no defences are successfully raised under Articles 35 and 36.[81]

4.3.a. The Application of the New York Convention and the Model Law in Canada

Canada acceded to the New York Convention without the "reciprocity" and "commercial" reservations.[82] Consequently, "foreign" awards need not have been made in a state that is a party to the Convention. However, arbitration disputes in Canada are largely decided with reference to the Model Law. Thus, it is necessary to examine the scope of application of the Model Law in Canada.

The application of the Model Law in Canada is limited to "international" "commercial" arbitration as defined by the Model Law. Article 1(3) & (4) of the Model Law defines "international" by reference to various connecting factors relating to the parties which if established, qualifies the arbitral award as international within the meaning of Article 1(1)

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[79] J.G. Castel, A. deMestral, & W. Graham, *supra* note 76 at 725.

[80] (1992) 7 O.R. (3d) 608 (Ont. Ct. Gen. Div.).

[81] *Ibid.*, at 619.

[82] J.G. Castel, A. DeMestral, & W. Graham, *supra* note 76 at 746.

of the Model Law.[83] This definition is contained in the arbitration laws of all jurisdictions, except at the federal level[84] and in Ontario.[85]

It is, however, not clear whether an arbitration concluded for example in Alberta will be regarded as "international" in the other provinces and the territories.[86] Therefore, it is "a matter of interpretation whether the word "state" in the Model Law means country, province, or territory."[87]

Also, the Model Law is limited to international arbitrations that arise out of contractual relationships which are "commercial" in nature.[88] The unstated assumption of international commercial relationships is that they usually involve parties of relatively equal bargaining strength.[89] Thus, in *Browski* v. *Heinrich Fiedler Psrforiertechnik GmbH*,[90] the court considered whether a contract of employment qualifies as a commercial relationship.

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[83] Model Law, *supra* note 8, Article 1(3). See discussion in Chapter 3 at 63-66.

[84] The federal *Commercial Arbitration Act* applies to both international and domestic arbitrations. Thus, Art. 2 of the federal *Commercial Code*, *supra* note 73, does not contain the word "international" thereby rendering the definition provisions in paragraphs (3) & (4) of Article 1 of the Model Law unnecessary.

[85] In Ontario, the ICAA, *supra* note 74, s. 2(3) provides that Article 1(3)(c) of the Model Law notwithstanding, an arbitration concluded in Ontario between parties that all have their places of business in Ontario is not international only because the parties have expressly agreed that the subject matter of the arbitration relates to more than one country.

[86] The positions in Ontario and British Columbia are different from other provinces. Ontario Act, *supra* note 74, sect. 1(7) and the British Columbia Act, *supra* note 75, sect. 1(5) provides that an arbitration taking place within their territory is not "international" when it has a relevant connection with two or more provinces. The arbitration laws of the other provinces and the territories does not provide for such express limitation.

[87] J.G. Castel, A. deMestral, & W. Graham, *supra* note 76 at 729.

[88] The Model Law does not define the word "commercial" but a footnote to Article 1(1) contain a very widely illustrative but not exclusive list of commercial relationships. See discussion in Chapter 3 at 66-67.

[89] Robert K. Paterson, *supra* note 70 at 9.

[90] (1994) 158 A.R. 213; (1994) 10 W.W.R. 623 (Alta. Ct. Queen's Bench).

The Alberta Court of Queen's Bench held that a contract of employment giving rise to the status of a master and servant and not a contract for services to be performed either by an agent or an independent contractor is not a "commercial" relationship under the Alberta *International Commercial Arbitration Act.*[91]

With respect to which court has original jurisdiction to recognise and enforce arbitral awards, in practice and in accordance with the arbitration laws of the territories and provinces, the courts of first instance exercise original jurisdiction.[92] The federal courts also exercise original jurisdiction on subject matters within the legislative competence of the federal government.

4.4. Commentary

Analysis of the U.S. and Canadian implementation of the New York Convention and adoption of the Model Law indicates that these instruments were concluded with the intention that they apply to arbitral awards of international status - that is, arbitral awards made in a foreign jurisdiction and awards made within the territory of the enforcing state but with an international connection. The difference between the two instruments is the criterion for determining when an award made in the enforcing state may be regarded as non-domestic. While the Convention allows the national law of the enforcing state to make such decision, the UNCITRAL Model Law, subject to modification by adopting states, provides in advance the criteria to be adopted.

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[91] *Heinrich Fielder GmbH*, *supra* note 90 at 634.

[92] See Alberta *ICCA*, *supra* note 77, Part 2, section 9 which states that the court of competent jurisdiction is the Alberta Court of Queen's Bench. See also B.C. *ICCA*, *supra* note 75, Article 2 which defines the court of competent jurisdiction as the Supreme Court of British Columbia.

In this study, references to arbitral awards include foreign arbitral awards as generally understood, and non-domestic awards in the conventional sense and as expanded in *Bergesen*. The expansive interpretation in that case seemingly favours international arbitration in the United States.[93] The *Bergesen* interpretation virtually synchronises with the meaning of "international arbitral awards" under the UNCITRAL Model Law.

4.5. *Enforcement of Arbitral Awards*

The New York Convention is the treaty which governs the enforcement of arbitral awards in the international arena.[94] Article III of the Convention imposes a primary obligation on contracting states to recognise and enforce arbitral awards in accordance with the rules of procedure of the territory where the award is sought to be enforced.[95]

In view of the fact that there is no uniform system of international procedural rules of enforcement for foreign awards, contracting states to the Convention have been left free to establish their own rules for recognition and enforcement of foreign awards.[96] Accordingly, section 207 of the FAA provides that:

> within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against

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[93] Albert Jan van den Berg, *supra* note 32 at 64.

[94] David M. Kall, "The United States' Double Standard Regarding Domestic Enforcement of International Arbitration Awards" (1993) 8 Ohio State Journal on Dispute Resolution 401 at 414.

[95] See New York Convention, *supra* note 7, Article III; Model Law, *supra* note 8, Article 35(1). Note that Article 35(1) added the phrase "irrespective of the country in which it [the award] was made", in order to include domestic and foreign awards rendered in international arbitrations.

[96] Ramona Martinez "Recognition and Enforcement of International Arbitral Awards under the United Nations Convention of 1958: The "Refusal" Provisions" (1990) 24 International Lawyer 487 at 496.

any other party to the arbitration...[97]

In Canada, the arbitration laws which implement the Convention and adopt the Model Law do not contain any statutory time limit within which a party must apply for recognition and enforcement of arbitral awards. In view of this, the courts adopt the local rules applicable for the enforcement of domestic awards.[98]

However, it is important to note that the rules of procedure which contracting states are free to prescribe for the recognition and enforcement of arbitral awards are not concerned with the conditions of enforcement which are exclusively governed by the Convention.[99] The conditions for recognition and enforcement of arbitral awards are spelt out under Article IV of the New York Convention.[100] This provision, "supersede[s] domestic law in respect of conditions to be fulfilled by a party seeking enforcement of a foreign award."[101]

The party opposing enforcement has the task of establishing the invalidity of the award on one of the grounds specified in Article V(1).[102] Placing the burden of proof on the party challenging the award makes resistance more difficult while easing the burden of the

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[97] FAA, c.2, *supra* note 28, section 207.

[98] J. G. Castel, "The Enforcement of Agreements to Arbitrate and Arbitral Awards in Canada" (1991) 17 Canada-United States Law Journal 491 at 505.

[99] Albert Jan van den Berg, *supra* note 16 at 239.

[100] Article IV of the New York Convention, *supra* note 7. See discussion in Chapter 2 at 27 and Chapter 3 at 57.

[101] Albert Jan van den Berg, *supra* note 16 at 248 where he notes that Article IV facilitates the request for enforcement of arbitral awards by requiring a minimum of conditions to be fulfilled by the party seeking enforcement.

[102] Leonard V. Quigley, *supra* note 24 at 1066, *Imperial Ethiopian Government* v. *Baruch-Foster Corp.*, 535 F. 2d 334, 336 (5th Cir. 1976).

party seeking enforcement of the award.[103]

Once a party seeking enforcement of the award has satisfied the requirements of Article IV of the Convention, the United States or Canadian courts will recognise and enforce the award unless the courts find one of the grounds specified under Article V of the New York Convention or Article 36 of the Model Law.[104]

If the losing party to an arbitration decides to bring an application for setting aside the award at the place where the award is made, the party is still obliged to prove the existence of one of the grounds stated in Article 34 of the Model Law.

4.5.1. *Grounds for Refusal of Enforcement of Arbitral Awards*

The New York Convention and the Model Law contain the exclusive sources from which authority to deny enforcement of an award may be drawn.[105] Article V of the Convention lists five limited grounds the opposing party may invoke to challenge the recognition and enforcement of the award and two other grounds upon which the competent authority of the forum state may, on its own motion, refuse recognition and enforcement of

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[103] Tara A. O'Brien, "The Validity of the Foreign Sovereign Immunity Defence in Suits under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1983-84) 7 Fordham International Law Journal 321 at 332.

[104] Michael Durgavich, *supra* note 6 at 410. See also FAA, c.2, *supra* note 28, section 207 which provides that the courts shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention; *Fitzroy Eng'g, Ltd.* v. *Flame Eng'g, Inc.*, 1994 WL 700173 at *3 (N.D. Ill. Dec. 13, 1994); *Indocomex Fibres Pte., Ltd.* v. *Cotton Co. International Inc.*, 916 F. Supp. 721 at 726 (W.D. Tenn. 1996); *Schreter* v. *Gasmac Inc.*, (1992) 7 O.R. (3d) 608, *supra* note 80.

[105] Joseph T. McLaughlin, *supra* note 4 at 287; Mary E. McNerney and Carlos A. Esplugues, "International Commercial Arbitration: The UNCITRAL Model Law" (1986) 9 Boston College International & Comparative Law Review 47 at 58 (hereinafter McNerney & Esplugues).

the award.[106] Article 34 of the Model Law which provides for recourse against awards by application for setting aside at the place or under the law where the award was made essentially duplicates the grounds for challenge to enforcement of awards found in the Convention and the Model Law.[107]

It is apposite to note that the Convention does not provide for the review of arbitral awards either on grounds of mistake of fact or law by the arbitrator.[108] Consequently, the enforcing court is prevented from reviewing an arbitration award "on the merits,"[109] except to the extent that it is necessary to ascertain whether a ground for refusal of enforcement is present.[110]

Also, under Article III of the Convention and Article 35(1) of the Model Law the duty to recognise and enforce arbitral awards is mandatory.[111] The adoption of such explicit language leaves no room for discretion to refuse to enforce the award in the absence of grounds provided in the Convention or the Model Law. In contrast, with respect to the grounds to refuse to enforce the award, Article V of the Convention and Article 36 of the Model Law employ permissive rather than mandatory language. That is, enforcement "may"

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[106] See Appendix I for detailed provisions of Article V of the Convention.

[107] See Appendix II for detailed provisions of Article 34 and 36 of the Model Law. The effect of a set aside award is discussed at 148 of this study.

[108] Albert van den Berg, *supra* note 16 at 269.

[109] Kenneth T. Ungar, "The Enforcement of Arbitral Awards under UNCITRAL Model Law on International Commercial Arbitration" (1987) 25 Columbia Journal of Transnational Law 717 at 744.

[110] Alberta van den Berg, *supra* note 16 at 270.

[111] See New York Convention, *supra* note 7, Article III; Model Law, *supra* note 8 Article 35(1). The FAA, c.2, *supra* note 28, section 207 was even more elaborate. It clearly states that "the court *shall* confirm the award *unless* it finds one of the grounds for refusal ..." (emphasis added).

be refused. Thus, it has been observed that this provision allows the enforcing court to exercise its discretion to the extent that:

> even if a party against whom the award is invoked proves the existence of one of the grounds for refusal of enforcement, the court still has a certain discretion to overrule the defence and to grant the enforcement of the award. Such overruling would be appropriate, for example, in the case where the respondent can be deemed to be estopped from invoking the ground for refusal. For the second paragraph it would mean that a court can decide that, although the award would violate the domestic public policy of the court's own law, the violation is not such as to prevent enforcement of the award in international relations.[112]

The Convention's preparatory works, the *travaux preparatoires*,[113] lend support to the discretionary character of Article V. The grant of such discretion is hardly accidental considering the dissatisfaction with the prior mandatory refusal provisions of Article II of the 1927 Geneva Convention.[114]

In *Schreter* v. *Gasmac Inc.*,[115] the court noted that it had no alternative to recognising an award unless the respondent established one of the stated grounds under Article 36 of the Model Law. Further, the court said that even then it had a residual discretion to enforce the award notwithstanding that one of the stated grounds was proven.[116]

Where the courts utilise this discretion effectively to refuse to deny enforcement of

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[112] Albert van den Berg, *supra* note 16 at 265. See also *Europcar Italia S.p.A.* v. *Alba Tours International Inc.*, Unreported (Ont. Ct. Gen. Div.), [1997] Onatrio Judgments No. 133.

[113] See U.N. Doc. E/CONF. 26/L. 34 (1958).

[114] See Gary H. Sampliner, "Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin" (1996) 11 Mealey's International Arbitration Report 22 at 23, where he noted that "the authors of the Convention knew to use the mandatory "shall" language in the articles contemplating enforcement of awards, while not using such language in the articles that sets forth defences to enforcement."

[115] (1992) 7 O.R. (3d) 608, *supra* note 80.

[116] *Ibid.*, at 614.

arbitral awards on flimsy grounds, it accords with the pro-enforcement bias of the Convention and the Model Law. Bearing these limitations and guidelines in mind, the substantive exceptions to the enforcement of arbitral awards are discussed below.

4.5.1.a. *Incapacity of the Parties or Absence of a Valid Arbitration Agreement*

Article V(1)(a) of the New York Convention and Article 36(1)(a)(i) of the Model permit a losing party to argue that the award should not be enforced because:

> The parties to the [arbitration] agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.[117]

This provision contains two grounds. First, it provides that an award may not be enforced if any of the parties is incapable of concluding an arbitration agreement. Second, the enforcement of the award may be refused if the arbitration agreement is invalid under the relevant law. The provision recognises that submission to arbitration is consensual and voluntary; thus, a court should not enforce an award against a party that never agreed to arbitrate.[118]

In order to determine the legal capacity of the parties the Convention provides that the enforcing court should refer to the law applicable to the parties. This has been interpreted to require the enforcing court to apply its own conflict of laws rules.[119] Due to differences

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[117] New York Convention, *supra* note 7, Article V(1)(a); Model Law, *supra* note 8, Article 36(1)(a)(i).

[118] Leonard V. Quigley, *supra* note 24 at 1067.

[119] Albert van den Berg, *supra* note 16 at 276.

in conflicts rules of the various countries, the Model Law dropped the phrase "under the law applicable to them" and inserted in its place, "a party to the arbitration agreement referred to in Article 7."[120]

Thus, whereas the Convention applies different rules for determining the capacity of the parties and the validity of the arbitration agreement, under the Model Law the law which governs the validity of the agreement also determines the capacity of the parties.[121]

Incapacity of a party to conclude an arbitration agreement might exist where there is general lack of legal capacity to enter into a contract, e.g., where a party is below the legal age requirement, is bankrupt or suffers from general mental disability. A state or other public body may lack the capacity to conclude an arbitration agreement if forbidden by domestic law to arbitrate certain disputes.[122] It is advisable that parties, before concluding a contract, should consult the laws of the state of each party concerning general contractual capacity.[123]

With respect to the validity of the arbitration agreement, the Convention provides that the enforcing court should determine the validity of the agreement only by the application of the law selected by the parties or, failing this, the law of the place of arbitration. Thus, in framing arbitration agreements the parties may themselves determine which nation's laws and

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[120] See UNCITRAL, *International Commercial Arbitration, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, U.N. Doc. A/CN.9.264 (1985) at 55 (hereinafter UNCITRAL Analytical Commentary).

[121] UNCITRAL Analytical Commentary, *ibid* at 55.

[122] Kenneth T. Ungar, *supra* note 109 at 745.

[123] Albert van den Berg, *supra* note 16 at 278.

arbitration rules will be invoked to settle the validity of the agreement.[124] This privileges the principle of party autonomy over the territorial concept which recognises the supremacy of the law of the place of arbitration.[125]

Invalidity of the arbitration agreement may result from lack of consent including any misrepresentation, duress, fraud or undue influence involved in the conclusion of the arbitration agreement.[126] The defence of fraudulent inducement as a basis for vitiating an arbitration agreement was restrictively interpreted by the U. S. Supreme Court in *Prima Paint Corp.* v. *Flood & Conklin MGF. Co.*[127] In that case, the defendant (F & C) entered into a contract with the plaintiff whereby F & C agreed to perform consulting and other services relating to the transfer of operations from F & C to Prima. The contract contained a broad arbitration clause that "[a]ny controversy ... arising out of this agreement or breach thereof, shall be settled by arbitration..."[128]

Prima alleged a breach of the contract and filed an action in court for termination of the contract and to restrain F & C from proceeding with arbitration. Prima's contention was that it entered into the contract based on F & C's fraudulent inducement or representation.[129]

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[124] Kenneth T. Ungar, *supra* note 109 at 746.

[125] Paolo Contini, *supra* note 2 at 300.

[126] Albert van den Berg, *supra* note 16 at 287.

[127] 388 U.S. 395 (1967). Although the case was decided under domestic arbitration, the court position should not be any different in international arbitration.

[128] *Ibid.*, at 395.

[129] *Ibid.*, Prima claimed that F & C fraudulently represented that it was solvent and able to perform its obligations whereas it was insolvent and planned to file a bankruptcy petition shortly after executing the consulting agreement.

The court declined to order a stay of arbitration. It held that since the claim of fraud related to inducement in concluding the consulting agreement generally rather than in the arbitration clause, it was a matter for the arbitrator to decide.[130] The court opined that courts should limit their consideration of arbitration clauses to issues relating to the making and performance of the agreement to arbitrate and not the contract itself.[131]

In *Overseas Cosmos, Inc.* v. *NR Vessel Corp.*,[132] the respondent challenged the enforcement of the award alleging that the Memorandum of Agreement (the "MOA") which contained the arbitration agreement was not valid under the law to which the parties subjected it. The respondent contended that because the MOA was not signed by the petitioner, (the MOA was signed by the respondent and a shipbroking firm on behalf of the petitioner), the agreement to arbitrate contained therein was not enforceable. The U.S. court stated that "it is well established that a party may be bound by an agreement to arbitrate even absent a signature."[133] The court also noted that Article II of the Convention requires only that an agreement to arbitrate be in writing to be enforceable, it does not require that it be signed by the parties.[134]

4.5.1.a.i. *Commentary on Article V(1)(a)*

It is hard to imagine a case where there would be proof of invalidity of the arbitration

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[130] *Prima Paint Corp.*, *supra* note 127 at 402-404.

[131] *Ibid.*

[132] West Law 757041 (S.D.N.Y. Dec. 8, 1997).

[133] *Ibid.*, at 3, referring to *Genesco, Inc.* v. *T. Kakiuchi & Co., Ltd.*, 815 F. 2d 840, 846 (2d Cir. 1987).

[134] *Overseas Cosmos*, *supra* note 132 at 3.

clause without proof of invalidity of the entire contract.[135] In addition, incapacity of the parties will inevitably bring into question the validity of the entire contract. Conscious of this fact, the court in *Prima Paint* impliedly discouraged the pursuit of this defence.

Furthermore, although not expressly stated in Article V(1)(a) of the Convention, invalidity of the arbitration agreement will include absence of a written agreement, as required under Article II of the Convention.[136] In other words, an oral agreement to submit disputes for arbitration will be invalid. However, it is difficult to imagine how the party seeking enforcement of the award will comply with the requirement of Article IV of the Convention in the absence of a written and valid arbitration agreement.[137] Also, the choice of law which should determine the validity of the agreement ought to be expressed in writing in the agreement itself. For these reasons, this provision has not been successfully raised by the parties.[138]

However, the view expressed by the court in *Overseas Cosmos*, to the effect that there is no obligation under the Convention for the parties to sign the arbitration agreement, is not correct. Article II(2) of the Convention and Article 7(2) of the Model Law require the parties to sign the arbitration agreement. It may be that the court was persuaded to enforce the award because the agreement was signed by the respondent, the party to be charged, which indicates

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[135] Notes, "The Express Defences of the New York Convention on Foreign Arbitral Awards" (1984) 5 New York Law School Journal of International & Comparative Law 103 at 111.

[136] Paolo Contini, *supra* note 2 at 300.

[137] New York Convention, *supra* note 7, Article IV; Model Law, *supra* note 8, Article 35(2) provides that the party seeking enforcement of the award must submit a copy of the agreement to the enforcing court.

[138] Albert van den Berg, *supra* note 16 at 291.

that the respondent did not object to the terms of the agreement.

Also, while the cases referred to were U.S. cases, it is my view that Canadian courts are likely to reject an application to deny the enforcement of an award for want of a valid arbitration agreement unless the basis for such invalidity of the agreement is substantiated.

4.5.1.b. *Lack of Fair Opportunity to be Heard*

By virtue of Article V(1)(b) of the New York Convention and Article 36(1)(a)(ii) of the Model Law the losing party can argue that the award should not be enforced because it:

> ... was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present [its] case.[139]

This provision incorporates a fundamental concept of procedural due process into the Convention.[140] It requires that each party be given adequate notice of the appointment of arbitrator(s)[141] and the arbitral proceedings. Failure to provide such reasonable notice to afford the party sufficient time to prepare its case or, where it was otherwise unable to do so, may lead to refusal of recognition and enforcement of the award.[142]

The phrase "was otherwise unable to present his case" deals with circumstances of *force majeure* or other causes which might prevent the party from presenting its case.[143] This

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[139] New York Convention, *supra* note 7, Article V(1)(b); Model Law *supra* note 8, Article 36(1)(a)(ii).

[140] See Model Law, *supra* note 8, Article 24 which provides that the parties shall be given sufficient advance notice of any hearing.

[141] This situation may arise if a substitute arbitrator is appointed due to failure or incapacity of the initial arbitrator to act. See Model Law, *supra* note 8, Article 14 & 15.

[142] Albert van den Berg, *supra* note 16 at 297.

[143] Leonard V. Quigley, *supra* note 24 at 1067.

may happen where the party was duly notified of the arbitral proceedings but was unable to attend because he/she was refused an entry permit for the state where the arbitration was being held or when the party appearing before the arbitrators was not given sufficient opportunity to defend its case.[144] This phrase generally refers to physical barriers to participation in the arbitral proceedings and does not include a deliberate decision by the losing party not to participate.[145]

Article V(1)(b) of the Convention covers the traditional requirement of fair hearing referred to as the principle of *audi alteram partem*, that is, hear the other side or hear both sides. It is a constitutional provision in many countries and is found in most treaties concerning the recognition and enforcement of foreign judgments.[146]

The Convention and the Model Law did not provide the basis for assessing what suffices as "proper notice." Given this lacuna, it has been suggested that reference should be made to the law chosen by the parties or the law of the rendering state.[147] However, in *Parsons & Whittemore Overseas Co.* v. *Societe Generale De L'Industrie du Papier (RAKTA)*,[148] the court was of the opinion that "this provision essentially sanctions the application of the forum's standard of due process."[149] It is however important that where

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[144] Pieter Sanders, "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1959) 6 Netherlands International Law Review 43 at 53.

[145] Kenneth T. Ungar, *supra* note 109 at 747.

[146] Albert van den Berg, *supra* note 16 at 300.

[147] Leonard V. Quigley, *supra* note 24 at 1067 (footnote 81).

[148] 508 F. 2d. 969 (2d Cir. 1974).

[149] *Ibid.*, at 975.

notice is given, it should be communicated in writing.

The courts have been invited to address Article V(1)(b) defences in situations where the party seeking to block enforcement of the award alleges that it was unable to present some part of its case because the arbitral tribunal did not allow it to present a particular witness, or because it could not cross-examine the other party's witness. The court has also been requested to annul an award where a party had notice of the hearing but decided not to attend and where a party alleged that it was unable to adequately present its case because it was misled by the arbitral tribunal. These cases' mainly from the U.S., are examined below.

In *Parsons & Whittemore Overseas Co.*,[150] the plaintiff (Overseas) an American corporation petitioned the court to deny enforcement of the award because the arbitrators refused to delay proceedings in order to accommodate the speaking schedule of its witness. The court observed that the logistical problems of scheduling hearing dates convenient to parties, counsel and arbitrators scattered about the globe argued against deviating from an initially mutually agreeable time plan unless a scheduling change was truly unavoidable.[151]

The court noted that "inability to produce one's witnesses before an arbitral tribunal is a risk inherent in an agreement to submit disputes to arbitration."[152] Furthermore, the court stated that by agreeing to submit disputes to arbitration, a party abandons its court room rights including that of summoning witnesses by subpoena, in favour of arbitration "with all

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[150] *Parsons & Whittemore Overseas Co., supra* note 148 at 975.

[151] *Ibid.*, the court was of the opinion that since Overseas's alleged key witness was kept from attending the hearing due to a prior commitment to lecture at an American university, was hardly the type of obstacle to his presence which would require the arbitral tribunal to postpone the hearing as a matter of fundamental fairness to Overseas.

[152] *Parsons & Whittemore Overseas Co., supra* note 148 at 975.

of its well known advantages and drawbacks."[153]

The court also noted that the alleged witness submitted an affidavit that provided basically the same information the witness would have presented in oral testimony.[154] The court therefore reasoned that if the arbitration tribunal had refused to consider the witness affidavit, Overseas would have had a more viable argument for implementing Article V(1)(b).[155] Thus, the court held that the arbitration tribunal acted within its power in refusing to delay the proceedings.[156]

Also, in the recent case of *In re Arbitration Between: Trans Chemical Ltd. & China National Machinery Import & Export Corp.*,[157] the respondent complained of various logistical problems it encountered because of the international nature of the case and sought a continuance of the arbitration proceedings until at least July 24, 1995. The arbitrators ruled that discovery should be completed by June 2, 1995 and granted a continuance until June 21, 1995.[158] On application to confirm the award, the respondent argued that the arbitrators engaged in conduct that prejudiced its rights to a fundamentally fair hearing by issuing an irrational scheduling order.

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[153] *Parsons & Whittemore Overseas Co., supra* note 148 at 975.

[154] *Ibid.*, at 976. In the affidavit, the witness referred to it as "a good deal of the information to which I would have testified."

[155] *Ibid.* The court argued that if the affidavit was incomplete, Overseas would have needed the witness in order support its case, or if Overseas had wanted to submit additional information, the tribunal would have been bound to consider it.

[156] *Ibid.*, at 975.

[157] 978 F. Supp. 266 (S.D. Tex. 1997), affirmed, 161 F. 3d 314 at 319 (5th Cir. 1998).

[158] *Ibid.*, at 307.

The court noted that although the arbitrators warned that any further postponements would be looked upon with great disfavour, the respondent proceeded to arbitrate the case on June 21, 1995 without further comment. It also observed that the respondent had in fact expressed to the petitioner on June 5, 1995 that it was "fully prepared to defend itself and advance its own claims."[159] The court stated that "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[160] It held that because there was no evidence that the respondent was denied this opportunity, its challenge of the award on ground of denial of its due process rights under the Convention could not succeed.[161]

In *Biotronik Mess-und Therapiegeraete GmbH & Co.* v. *Medford Medical Instrument Company*,[162] the court was asked to consider the defendant's claim that it was "unable to present its case." In that case, the respondent (Medford), apparently had notice of the arbitration proceeding but voluntarily absented itself from the proceedings and thus did not submit its own evidence.[163] Medford did not offer any explanation for its absence from the arbitration tribunal. It argued in court that the commencement of arbitration was premature

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[159] Trans Chem Ltd., *supra* note 157 at 307.

[160] *Ibid.*, at 310 quoting *Mathews* v. *Eldridge*, 424 U.S. 319 at 333 (1976); *Iran Aircraft Indus.* v. *Avco Corp.*, 980 F. 2d 141 at 146 (2d. Cir. 1992).

[161] *Ibid.*

[162] 415 F. Supp. 133 (D.C.N.J. 1976).

[163] *Ibid.*, Medford however submitted to the arbitration panel a copy of its July 17, 1972 letter which served as a denial of Biotronik's claims.

because its rights and liabilities under the disputed agreement had not matured.[164] The court disagreed with Medford holding that the primary elements of due process are notice of the proceedings and the opportunity to be heard.[165] The court concluded that neither the actions of Biotronik nor the panel had any effect upon Medford's ability to present its case.[166]

Similarly, in *Anhui Provincial Import & Export Corp.* v. *Hart Enterprises International, Inc.*,[167] the respondent was notified of the arbitration and requested that it appoint its arbitrator and forward its statement of defence. The respondent did not and, consequently, the arbitral institution, the China International Economic and Trade Commission (CIETAC), appointed an arbitrator on behalf of the respondent and confirmed to it that the tribunal had been constituted. CIETAC scheduled an arbitration hearing and advised the respondent. The respondent did not reply to the notice and did not appear before the arbitration panel. In the meantime, the respondent had commenced an action against the petitioner.

In an action to confirm the award, the respondent challenged the enforcement of the award on the ground that it was not given proper notice of the arbitration proceedings. The

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[164] *Biotronik Mess-und, supra* note 162 at 136-137. Medford accepted liability under the agreement that was the subject of arbitration. Its opposition to the enforcement of the award was based on a "Third Agreement" which allegedly conferred on Medford a right to offset its liability to Biotronik by commissions receivable from that agreement. Medford argued that Biotronik, when it appeared alone at the arbitration hearing, deliberately withheld this information which was a calculated attempt to mislead the arbitrators.

[165] *Ibid.*, at 140-141. The court was of the view that if the existence of the "Third Agreement" and the alleged untimely initiation of the arbitration proceedings would had made any difference to Medford's position, Medford ought to have made this known to the arbitration panel.

[166] *Ibid.* See also *Goetech Lizenz AG* v. *Evergreen Systems*, 697 F. Supp. 1248 at 1253 (E.D.N.Y. 1988), where the court reiterated that a party is not denied the opportunity to present its defences under article V(1)(b) when it had notice of an arbitration, but chose not to respond.

[167] 1996 West Law 229872 (S.D.N.Y. May 7, 1996).

court found as a fact that the respondent was duly notified of the arbitral proceedings, but that the respondent ignored the notice because of its belief that the arbitration hearing would not occur until the court ruled on its action against the petitioner.[168] However, the court noted that the respondent never sought a stay of the arbitration proceedings pending resolution of the litigation. It thus held that the respondent had proper notice of the proceeding and a full opportunity to present a defence and "that it failed to do so was no one's fault but its own."[169]

Also, in the Canadian case of *Kanto Yakin Kogyo Kabushiki-Kaisha* v. *Can-Eng Manufacturing Ltd.*,[170] the respondent was duly served with the Notice of Claim along with the hearing date for arbitration. Can-Eng did not submit a Statement of Defence and was absent on the hearing day without reason. The Ontario court granted the Japanese company an order to enforce the arbitral award in Ontario.[171]

The decisions in *Biotronik*, *Hart Enterprises* and *Can-Eng* are also supportable under Article 25 of the Model Law. Under this provision, where a party fails to appear at the hearing or to produce documentary evidence, "the arbitral tribunal may continue the proceedings and make the award on the evidence before it."[172]

The Article V(1)(b) defence was also considered in the U.S. case of *Laminoirs-*

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[168] *Hart Enterprises*, *supra* note 167 at 2.

[169] *Ibid.*, at 3.

[170] (1992) 7 O.R (3d) 779; 4 B.L.R. (2d) 108 (Ont. H.C. J.).

[171] *Ibid.*, at 794.

[172] Model Law, *supra* note 8, Article 25(c). See also Kenneth T. Ungar, *supra* note 109 at 747 (footnote 151); Alan Redfern & Martin Hunter, *supra* note 13 at 266-69.

Trefileries-Cableries de Lens, S.A. (LTCL) v. *Southwire & Co.*[173] Southwire alleged that it was prevented from offering certain pertinent evidence at the arbitral hearing.[174] The court was not persuaded by Southwire's argument.[175] The court observed that "arbitrators are charged with the duty of determining what evidence is relevant and what is irrelevant and, barring a clear showing of abuse of discretion, the court will not vacate an award based on improper evidence or lack of proper evidence."[176] Thus, the court held that Southwire was not denied a fair hearing by the evidentiary decisions made by the tribunal and refused to deny the enforcement of the award. [177]

In *Generica Ltd.* v. *Pharmaceutical Basics, Inc.*,[178] the respondent alleged that the arbitrator's curtailment of cross-examination of one of the petiotioner's witnesses did not satisfy fundamental due process requirements. The court noted that the arbitrator enjoys wide latitude in conducting an arbitration hearing and that the arbitrator decided to halt further cross-examination of the witness because he was of the view that he had before him ample

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[173] 484 F. Supp. 1063 (N.D. Ga. 1980).

[174] *Ibid.*, at 1066. Southwire contended that its' attorney was not allowed to fully cross-examine LTCL's international projects manager with regard to a renegotiation clause in the contract, and that allowance of such questioning would have aided its case.

[175] *Ibid.*, at 1067. The court observed that the record of arbitration proceedings revealed that the Chairman of the tribunal limited questioning to "matters of fact albeit recent matters of fact which might conceivably have some bearing on what was the intent of the parties..." and that Southwire was allowed to introduce documentary evidence of the parties' alleged intent as to future course of action, and allowed to make "argumentative interpretation" of such evidence in its summation to the tribunal.

[176] *Ibid.*

[177] *Ibid.*, at 1067.

[178] 125 F. 3d 1123 (7th Cir. 1997).

evidence upon which to decide the dispute.[179] Thus, the court stated that the arbitrator did not abuse his discretion in his handling of this evidentiary ruling and that the curtailment of cross-examination of the witness was not such a fundamental procedural defect as to violate the due procees jurisprudence under the New York Convention.[180]

In *International Standard Electric Corporation (ISEC)* v. *Bridas Sociedad Anonima Petrolera, Industrial Commercial,*[181] ISEC alleged that the arbitration tribunal refused to disclose the identity of an expert witness appointed by the arbitrators. ISEC also alleged that it was denied the examination of the expert's opinion and a meaningful opportunity to rebut that opinion.[182] The court observed that ISEC never objected to the appointment of the expert and never demanded access to his report.[183] Thus, the court rejected ISEC's argument, holding that to accept it at that point would "violate the goal and purpose of the Convention, that is, the summary procedure to expedite the recognition and enforcement of arbitration awards."[184]

Under Article 26 of the Model Law, unless otherwise agreed by the parties, the arbitral tribunal may appoint expert(s) to report to it on specific issues. Similarly, any of the parties may request an opportunity to put questions to the expert witness or to present expert

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[179] *Generica Ltd.*, *supra* note 178 at 1130-1131.

[180] *Ibid.*, at 1131.

[181] 745 F. Supp. 172 (S.D.N.Y. 1990).

[182] *Ibid.*, at 178.

[183] *Ibid.*, at 179. In addition, the court found that ISEC was satisfied with the response of the arbitrator regarding ISEC's request for the identity of the expert witness, whereupon, ISEC made no further objection on the issue.

[184] *International Standard Electric Corp.*, *supra* note 181 at 180.

witness(es) to testify on the point addressed by the appointed expert.

The Article V(1)(b) defence was also considered in *Iran Aircraft Industries and Iran Helicopter Support and Renewal Company* v. *Avco Corporation.*[185] The case involved an arbitral award made by the Iran-U.S. Claims Tribunal in The Hague.[186] IACI and Avco entered into a series of contracts beginning in 1976. Under the contracts, Avco agreed to sell and service helicopter engines and parts for IACI.[187] Performance of the contract broke down after the Iranian revolution began in 1978.[188] On January 14, 1982, the parties submitted their dispute to the Tribunal for binding arbitration.[189]

A pre-hearing conference was held on May 17, 1985[190] where Avco's counsel proposed submitting as evidence accounts of Avco's invoices certified by an outside auditing agency instead of the actual invoices.[191] In response, the Chairman of the Tribunal at the pre-

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[185] 980 F. 2d 141 (2nd Cir. 1992).

[186] The Iran-U.S. Claims Tribunal was set up as a result of the Islamic revolution in Iran and an attack on the American embassy in which U.S. diplomats and consular officials were taken hostage. Due to this development, long-time and complex commercial relationships were destroyed. In an effort to resolve contractual claims between nationals of the two countries, an executive agreement, the Algiers Accord was reached between the Government of the United States of America and the Government of the Islamic Republic of Iran. See Elsie P. Wheeless, "Article V(1) (B) of the New York Convention" (1993) 7 Emory International Law Review 805 at 826-287. See also Gunnar Lagergren, "Iran-United States Claims Tribunal" (1990) 13 Dalhousie Law Journal 505.

[187] *AVCO Corporation, supra* note 185 at 142.

[188] *Ibid.* As a result of the revolution in November, 1978 Avco suspended performance of the contract.

[189] Initial attempt by the parties to settle the dispute which led to the 1980 "Paris Agreement" was not fully successful. See Elsie P. Wheeless, *supra* note 186 at 828 (footnote 154).

[190] Pre-hearing conferences are authorised under the Tribunal's Rules of Procedure. See Final Tribunal Rules of Procedure, Article 15, reprinted in (1984) 2 Iran-U.S. Claims Tribunal Report 505 at 419.

[191] *AVCO Corporation, supra* note 185 at 143. The purpose of the Pre-hearing was to consider whether "voluminous and complicated data should be presented through summaries, tabulations, charts, graphs or extracts in order to save time and costs." This type of evidence was allowed under the *Internal Guidelines of the Tribunal*, para. 2(g). See (1983) 1 Iran-U.S. Claims Tribunal Report 98.

hearing[192] stated that the tribunal would not be "very much enthusiastic about getting kilos and kilos of invoices"[193] and therefore instructed Avco to present an auditor's summary to prove its claim.[194] On July 22, 1985, Avco submitted a memorandum to the Tribunal stating that it had retained an auditor to audit the invoices and certify the amount of Avco's claim.[195]

At the actual hearing, the Tribunal stated that the summaries prepared by Avco's auditor were inadmissible as evidence and ruled that it could not "grant Avco's claim solely on the basis of an affidavit and a list of invoices, even if the existence of the invoices was certified by an independent audit."[196] Judge Brower,[197] the arbitrator representing Avco at the Tribunal, filed a dissenting opinion in which he stated:

> I believe the Tribunal has misled the Claimant, however unwittingly, regarding the evidence it was required to submit, thereby depriving Claimant, to that extent, of the ability to present its case. ... Since Claimant did exactly what it previously was told to do by the Tribunal the denial in the present Award of any of those invoice claims on the ground that more evidence should have been submitted constitutes a denial to Claimant of the ability to present its case to the Tribunal.[198]

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[192] Both the Iranian parties and the arbitrator representing them, were absent at the pre-hearing. See *AVCO Corporation*, *supra* note 185 at 144

[193] *Ibid.*, at 143.

[194] *Ibid.*, at 144.

[195] *Ibid.* An affidavit from the Auditing firm verified that the accounts receivable ledgers submitted by Avco agreed with Avco's original invoices, with the exception of one invoice.

[196] *AVCO Corporation*, *supra* note 185 at 144.

[197] At the actual hearing, Judge Brower was the only judge of the panel who was present at the pre-hearing. The Chairman of the Tribunal who presided at the pre-hearing, Judge Nils Mangard of Sweden had resigned and replaced by Judge Michel Virally of France. Judge Mangard was allegedly battered and assaulted by the Iranian arbitrator with a threat that "[i]f Mangard ever dares to enter the Tribunal Chamber again, either his corpse or my corpse will leave it rolling down the stairs." See Elise P. Wheeless, *supra* note 186 at 831 citing an article "Iranian Judge Threatens a Swede at The Hague" in New York Times, September 7, 1984 at A5, Col. 2.

[198] *AVCO Corporation*, *supra* note 185 at 144.

An application to enforce the award was rejected by the U.S. District Court which granted summary judgment to Avco. The Iranian parties appealed to the U.S. Court of Appeal for the Second Circuit which affirmed the decision of the lower court. The court stated that:

> We believe that by so misleading Avco, however unwittingly, the Tribunal denied Avco the opportunity to present its claim in a meaningful manner. Accordingly, Avco was "unable to present [its] case" within the meaning of Article V(1)(b)...[199]

In his dissent, Judge Cardomone expressed the view that the acceptance of Avco's suggestion to supply summaries of the invoices at the pre-hearing did not constitute a binding ruling that the summaries could substitute for the invoices and would be sufficient evidence at trial.[200] He concluded that Avco "took a calculated risk" in choosing not to produce the original invoices and, therefore, cannot complain that it was prevented from presenting its case before the Tribunal.[201]

4.5.1.b.i. *Commentary on Article V(1)(b)*

Although Article V(1)(b) is often raised, it had rarely been given judicial sanction until *Avco*. Despite the broad wording of this provision, the U.S. courts have construed it narrowly except for very serious violations of due process. *Parsons*, *Biotronik*, *Hart Enterprises*, *Can-Eng*, *Southwire*, *Generica Ltd.*, and *Bridas* represent one end of the spectrum, that is, the need to construe the due process provision narrowly in order to recognise and enforce arbitral

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[199] *AVCO Corporation*, *supra* note 185 at 146.

[200] *Ibid.*

[201] *Ibid.*, at 148.

awards. *Avco* represents the other end of the spectrum, that is, that an egregious process violation by the arbitral tribunal may affect the enforcement of awards.[202] It was the first case to refuse enforcement of an international arbitral award under the Article V(1)(b) defence within the United States and Canada.[203]

It is easy to acquiesce with the bases for the decisions in *Parsons* and others; however, the court decision in *Avco* requires closer consideration. Whilst it is conceded that Avco had genuine intentions in providing an abridged version of the invoices and might have incurred extra costs in doing so,[204] this did not preclude Avco from providing the original invoices when one of the arbitrators raised the issue at the hearing on merits. The arbitrator clearly suggested to Avco that non-submission of the invoices might have a direct consequence on the substantiation of its claim.[205] Avco ought to have taken the hint and immediately provided, or requested time to submit, those invoices especially when it claimed at the pre-hearing that "I want to assure the Tribunal that all of the invoices ... exist and are available."[206] Avco also stated that "we're prepared to do it either way", that is, to provide

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[202] Elise P. Wheeless, *supra* note 186 at 827.

[203] The cases relied on by Avco in the court were decided under domestic arbitration. A reading of those cases reveals that enforcement was refused because the cases either involved arbitration hearings actually cut short and not completed before an award was rendered, see *Confinco, Inc.* v. *Bakrie & Bros, N.V.*, 395 F. Supp. 613 at 615 (S.D.N.Y. 1975) and *Teamsters, Local Union No. 506* v. *E.D. Clapp Corp.*, 551 F. Supp. 570 at 577-78 (N.D.N.Y. 1982), affirmed, 742 F. 2d 1441 (2d Cir. 1983), or a panel's outright refusal to hear certain relevant evidence at all, see *Harvey Aluminium Inc.* v. *United Steelworkers*, 263 F. Supp. 488 at 493 (C.D.Cal. 1967).

[204] Avco stated that its request is "in the interest of keeping down some of the documentation for the Tribunal." *AVCO Corporation, supra* note 185 at 143.

[205] *AVCO Corporation, supra* note 185 at 144.

[206] *Ibid.*, at 143.

the "raw data" or the summarised version.[207]

Assuming the pre-hearing decision was binding on the Tribunal at the actual hearing, the decision did not estop the Tribunal from calling for the original invoices, especially where they were required to substantiate the exact issue in dispute. In *Southwire*, the court observed that "arbitrators are charged with the duty of determining what evidence is relevant and what is irrelevant, and that barring a clear showing of abuse of discretion, the court will not vacate an award..."[208] I do not think it is plausible to argue that since the pre-hearing tribunal had decided on what constitutes "relevant" evidence, reversal of that decision would amount to abuse of discretion.

Analysing the impact of this decision, a commentator observed that it might result in retaliatory action by signatories to the Convention.[209] The commentator further noted that:

> this decision unnecessarily and inappropriately provides authority for United States courts to refuse enforcement of foreign arbitral awards under the New York Convention and may needlessly deter, and possibly destabilize, international arbitration.[210]

Whilst this view may have unduly exaggerated the effect of the decision in *Avco*, there is no doubt that it has created judicial authority for refusal to recognise and enforce arbitral awards under the guise of abuse of due process.

However, the decision in *Avco* should be regarded as an exception to the narrow

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[207] *AVCO Corporation, supra* note 185 at 144.

[208] *Southwire, supra* note 173 at 1067.

[209] Sean J. Cleary, "International Arbitration-Foreign Arbitral Awards-Enforcement of Foreign Arbitral Award Refused Under Article V(1)(B) of the New York Convention, iraN Aircraft Industries V. Avco Corp." (1994) 17 Suffolk Transnational Law Review 566 at 577.

[210] *Ibid.*, at 557.

interpretation of the Article V(1)(b) defence adopted by the U.S. (and one Canadian) courts. *Avco* might as well serve as a caution to arbitral tribunals that, notwithstanding the courts' pro-enforcement attitude, the courts will not hesitate to refuse enforcement of awards where the arbitrators display reckless conduct during the arbitral proceeding.[211]

It is also important to note that while most of the cases discussed under the Article V(1)(b) defence are from U.S. courts, it is my view that these decisions will be persuasive in Canadian courts when considering the Article V(1)(b) defence. This is particularly so because the U.S. court decisions correspond with the relevant provisions of the Model Law which serves as the main legislation on international commercial arbitration in Canada.

4.5.1.c.i. *The Award or Inseparable Part of it Exceeds the Submission to Arbitration*

Article V(1)(c) of the New York Convention and Article 36(1)(a)(iii) of the Model Law state that the losing party can argue against the enforcement of the award if:

> the award deals with a difference not complemented by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.[212]

Article V(1)(c) of the Convention states that a party should not be obliged to abide by an award beyond the issues it had agreed to arbitrate.[213] Where the disputed part of the

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[211] Albert van den Berg, *supra* note 16 at 310.

[212] New York Convention, *supra* note 7, Article V(1)(c); Model Law, *supra* note 8, Article 36(1)(a)(iii).

[213] Leonard V. Quigley, *supra* note 24, at 1068; Kenneth T. Ungar, *supra* note 109 at 745, Ramona Martinez, *supra* note 96 at 501; Elisabeth M. Senger-Weiss, *supra* note 4 at 77.

award can be severed from the rest of the award, the party will be bound to the award to the extent of its agreement. The rationale for enforcing the undisputed part of the award is based on the fact that:

> if the enforcing court was not authorized to sever that (extraneous) matter from the remainder of the award and was obliged to refuse enforcement altogether merely because a small detail fell outside the scope of the arbitral agreement, the applicant might suffer unjustified hardship.[214]

It is up to the enforcing court to decide whether the arbitral tribunal exceeded its authority and if any part of the award falls within the matters submitted to arbitration. The courts shall also decide whether such part of the award "can be separated" from the remaining award that contains issues not so submitted.[215]

The Convention does not provide details on when arbitral awards may be considered to be in excess of the powers conferred on the arbitrator(s). The reasonable deduction is that an award exceeds the authority of the arbitrator if its contents are beyond the subject matter of the arbitration agreement or contract, or where the arbitrator made a decision on matters beyond his specific terms of reference.[216]

However, another commentator suggests that the enforcing court should refer to the law chosen by the parties or the law where the award was made.[217] With due respect, this approach is unnecessary. What is at stake here is the extent to which the parties have agreed

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[214] This view was expressed by the Indian delegate at the UN Conference concluding the New York Convention. See U.N. Doc. No. E/Conf. 26/SR. 17 at 9.

[215] Pieter Sanders, *supra* note 144 at 53.

[216] See Albert van den Berg, *supra* note 16 at 747.

[217] Leonard V. Quigley, *supra* note 24 at 1068 (footnote 82).

to arbitrate. An examination of the written arbitration agreement or the contract containing the arbitration clause should provide a sufficient basis to determine what is agreed upon and what is excluded. Accordingly, in the U.S. case of *Davis* v. *Chevy Chase Financial Ltd.*,[218] the court noted that:

> Arbitration is ... a matter of contract, and the contours of the arbitrator's authority in a given case are determined by reference to the arbitral agreement. .. [T]he genesis of arbitral authority is the contract, and arbitrators are permitted to decide only those issues that lie within the contractual mandate. By necessary implication, an arbitral award regarding a matter not within the scope of the governing arbitration clause is one made in excess of authority...[219]

The Article V(1)(c) defence has been the subject of judicial interpretation in both the U.S. and Canada. In the U.S. case of *Parsons & Whittemore*,[220] the defendant argued that the tribunal went beyond the scope of submission when it made an award for "loss of production" even though the contract stated that "neither party shall have any liability for loss of production."[221] The court gave a narrow application of this defence and held that, notwithstanding the express provision of the contract, the arbitrators acted within the scope of their authority.[222]

The court was of the view that so long as it could be reasonably believed that the arbitral tribunal had not ignored the contract provision, but had applied the clause the way it

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[218] 667 F. 2d 160 (D.C.Cir. 1981).

[219] *Ibid.*, at 165.

[220] 508 F. 2d 969, *supra* note 148.

[221] *Ibid.*, at 976.

[222] *Ibid.*

understood it, it was not necessary for the court and the arbitrators to agree on a contract interpretation.[223] A contrary finding, the court reasoned, would attempt to "secure a reconstruction ... of the contract, an activity wholly inconsistent with the deference due [to] arbitral decisions on law and fact."[224]

In *M & C Corporation* v. *Erwin Behr GmbH & Co., KG*,[225] the respondent argued that the statutory damages granted to the applicant pursuant to the provisions of a Michigan statute were beyond the scope of reference to the arbitrators. The U.S. court observed that the parties had agreed that any dispute involving their business relationship would be resolved according to the laws of the State of Michigan. It also noted that the terms of reference provided that the applicant seeks "other relief" that is avaliable under the applicable law to compensate it for loss "as a result of [the respondent's] failures [to pay the full amount of commissions due]."[226] The court therefore concluded that it was within the arbitrator's terms of reference to award both the actual amount of commission due to the petitioner as well as any other compensatory relief to which the respondent might be entitled under the applicable laws of the State of Michigan.[227]

In *Fertilizer Corp. of India* v. *IDI Management, Inc.*,[228] the arbitrators awarded

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[223] *Parsons & Whittemore*, *supra* note 148 at 976-977.

[224] *Ibid.*

[225] 87 F. 3d 844 (6th Cir. 1996).

[226] *Ibid.*, at 850.

[227] *Ibid.*

[228] 517 F. Supp. 948, *supra* note 58.

consequential damages which were excluded by the contract between the parties.[229] The U.S. court noted that the arbitral panel in IDI gave a "speaking award", that is, the award contained the arbitrators reasoning.[230] The court observed that the arbitrators specifically referred to the liability exclusion clause in the contract, establishing beyond doubt that they did not ignore that provision.[231] Thus, in accordance with the principle in *Parsons & Whittemore*, the court refrained from substituting its own interpretation of the contract for that of the arbitrators. It therefore held that the arbitrator acted within the scope of its authority.[232]

In the Canadian case of *Quintette Coal Limited* v. *Nippon Steel Corp.*,[233] Quintette sought to have the award set aside on the ground that the arbitrators went beyond the scope of the submission to arbitration by staging a reduction of the price to be paid by Nippon for coal deliveries made by Quintette between March 31, 1987 and March 31, 1991.[234] Quintette argued that in line with clause 7 of the contract,[235] when the fixed price component was set as at April 1, 1987, it must remain at that level for the ensuing four years.

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[229] *Fertilizer Corp. of India, supra* note 58 at 958. The arbitration agreement excluded any amount for lost of profits but the terms of reference signed by both parties which constituted the framework of the arbitration, included consequential damages.

[230] *Ibid.*, at 960.

[231] *Ibid.*

[232] *Ibid.*, at 959.

[233] (1990) 50 B.C.L.R. (2d) 207 (B.C.C.A.).

[234] *Ibid.*, at 208.

[235] Clause 7 titled "Price Review" provides that "the base price shall be reviewed during the four months prior to March 31, 1987, March 31, 1991 and March 31, 1995 at the request of either Seller or Buyer.." *Quintettee Coal Ltd., supra* note 233 at 209.

The court observed that in the notice of request for arbitration, the arbitrators were asked to determine what "base price should be set pursuant to clauses 7 or 9 of the Agreement, or both, for coal contracted to be delivered between March 31, 1987 and March 31, 1991."[236] The arbitrators discovered that clause 9[237] had been invoked on three occasions between 1985 and 1987 to reduce the fixed component price within a period less than the four year limitation provided in clause 7 of the contract.[238] Thus, in making the award, the arbitral panel relied upon that experience as establishing "a pattern of price setting that in effect amounts to staging the price reduction."[239]

The British Columbia Court of Appeal, in affirming the decision of the lower court which declined to set aside the award, noted that although the Chairman of the arbitral panel stated that "it is not necessary for me to make an order pursuant to Clause 9", the jurisdiction to do what the arbitrators did was available to them in Clause 9.[240] Thus, even though it appeared to the court that the Chairman may have misconstrued Clause 9 of the contract, the court nevertheless, applying the principle in *Parsons & Whittemore Overseas Co.*, held that the decision was within the scope of the submission to arbitration.[241]

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[236] *Quintettee Coal Ltd., supra* note 233 at 210.

[237] Clause 9 titled "Inequity Review", provides that "if any significant change in the metallurgical coal market takes place at any time during the term of the contract either party shall have the right to request a price review..." *Ibid.*, at 209.

[238] *Ibid.*, at 210.

[239] *Ibid.*

[240] *Ibid.*

[241] *Quintettee Coal Ltd., supra* note 233 at 211(leave to appeal to the Supreme Court of Canada was denied on December 13, 1990).

However, in *Aamco Transmissions Inc.* v. *Kunz*,[242] the Saskatchewan Court of Appeal upheld the decision of the lower court in refusing to enforce an award made in the U.S. because the award covered an issue that was excluded from arbitration by the agreement. In that case, the appellant terminated a franchise agreement with the respondent because, *inter alia*, the respondent failed to file business reports. The arbitration agreement contained a proviso excluding from arbitration matters arising from "... termination by AAMCO which is based in whole or in part, upon the fraudulent acts of Franchisee or ... Franchisees's failure to accurately report his gross receipts to AAMCO ..."[243]

The appellant argued that the proviso should be interpreted narrowly so as to cover only fraudulent or quasi-fraudulent actions and not termination for failure of the franchisee to file reports. The court rejected this argument holding that failure of the respondent to file business reports was explicitly mentioned in the arbitration clause as a non-arbitrable matter.[244]

4.5.1.c.i. *Commentary on Article V(1)(c) Defence*

Article V(1)(c) of the Convention shows a bias in favour of enforcement of arbitral awards by permitting partial enforcement of a severable portion of an award that is within the scope of the submission to arbitration.[245] The U.S. court in *Parsons & Whittemore* stated that the defence should be construed narrowly to create a presumption that the arbitral tribunal

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[242] (1992) 67 Sask. R. 5 (C.A.).

[243] *Ibid.*, at 6.

[244] *Ibid.*, at 7.

[245] Ramona Martinez, *supra* note 96 at 502.

acted within its powers.[246] It opined that the courts must resist the urge to substitute their own contract interpretation for that of the arbitrators.[247]

The principle in *Parsons & Whittemore* was adopted by the Canadian court in *Quintette*. In that case, the court noted that even if the arbitral tribunal was wrong in its conclusion on the provision of an agreement, "that would constitute mere error in interpreting the contract and would not, under the [Model Law], provide a ground for setting aside."[248] Thus, both the U.S. and Canadian courts have adopted a narrow interpretation of the Article V(1)(c) defence which comports with the enforcement-facilitating thrust of the Convention.[249]

In the *Kunz* case, the arbitration agreement clearly excluded from arbitration termination of the franchise agreement based on the franchisee's fraudulent or failure to file his reports. It is obvious that the effect of the proviso was to avoid arbitration if the appellant exercised its right to terminate the franchise agreement for reasons stated in the proviso. Thus, the court was correct in holding the appellant to its bargain.

4.5.1.d. Irregularity in the Composition of the Arbitral Tribunal or the Arbitral Procedure

The fourth ground for challenging arbitral awards is contained in Article V(1)(d) of the New York Convention and Article 36(1)(a)(iv) of the Model Law. The provisions state that the losing party can argue for non-enforcement of the award on the grounds that:

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[246] *Parsons & Whittemore*, *supra* note 148 at 976.

[247] *Ibid.*, at 976-977.

[248] *Quintette Coal Ltd.*, *supra* note 233 at 218.

[249] *Parsons & Whittemore*, *supra* note 148 at 976.

> The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.[250]

Article V(1)(d) represents a compromise between the advocates of complete party autonomy and the those who argue that arbitral procedures should be subjected to the law of the place of arbitration.[251] Thus, Article V(1)(d) allows the parties to agree on the rules which should govern the composition of the arbitration panel and procedure. Failing such agreement, the law of the place of arbitration shall apply. The courts may refuse enforcement of an award rendered in violation of the expressed intentions of the parties or the law of the place of arbitration, where applicable.

However, the extent to which the parties are free to determine the composition of the arbitration panel and arbitral procedure is subject to different interpretations.[252] One school of thought holds that the parties are free to agree on the rules guiding the composition and procedure of the arbitral tribunal to the extent that they could select the national law of a particular country. In other words, the freedom to agree on the rules of composition of the arbitration tribunal and procedure does not entitle the parties to disregard all national laws and determine some special procedure applicable to their case alone.[253]

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[250] New York Convention, *supra* note 7, Article V(1)(d); Model Law, *supra* note 8, Article 36(1)(iv).

[251] Leonard V. Quigley, *supra* note 24 at 1068.

[252] *Ibid.*

[253] Paolo Contini, *supra* note 2 at 303. This view was expressed by the Italian delegation at the Conference supported by the U.S. The Italian delegation noted that the paragraph was "inserted on the understanding that the parties enjoy discretion only to the extent that they could select the national law applicable in the matter." See U.N. Doc. N. E/CONF. 26/SR.17 at 10 (1985).

Conversely, the second school of thought argues that Article V(1)(d) merely requires the arbitral procedure to accord with the rules the parties had chosen. Such rules need not conform with any preexisting national law.[254] This school of thought expresses the view that their interpretation of Article V(1)(d) corresponds with the intention of the Convention, which seeks to denationalise arbitration.[255]

However, in practice, arbitration agreements provide for composition of the tribunal and the conduct of arbitral procedure in accordance with institutionalised arbitration bodies.[256] International and national arbitration institutions like the American Arbitration Association, the International Chamber of Commerce, the London Court of International Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce maintain elaborate rules designating the composition of arbitrators and of arbitral procedures.[257] The UNCITRAL Arbitration Rules of 1976 (part of which is contained in the Model Law) may also be applied by reference.[258]

Be that as it may, the generally accepted interpretation is that the parties must ensure that the applicable rules accord with the basic due process notion. Thus, the court may deny enforcement of an award rendered in accordance with the parties' wishes if the agreement,

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[254] See Bernardo M. Cremades, "The Impact of International Arbitration on the Development of Business Law" (1983) 31 American Journal of Comparative Law 526; Albert van ben Berg, *supra* note 16 at 323. This was the position taken by France and the International Chamber of Commerce at the New York Conference. See Leonard V. Quigley, *supra* note 24 at 1068.

[255] Albert van den Berg, *supra* note 16 at 323.

[256] Kenneth T. Ungar, *supra* note 109 at 748.

[257] *Ibid.*

[258] UNCITRAL Arbitration Rules, 1976, reprinted in Alan Redfern & Martin Hunter, *supra* note 13 at 416-447.

for example, provides that one party only may nominate the arbitrator(s) or that the arbitral tribunal may decide the matter without hearing from the respondent.[259]

This controversy has, however, not featured prominently in the U.S. courts' consideration of the Article V(1)(d) defence. In *Imperial Ethiopian Government* v. *Baruch-Foster Corp.*,[260] the president of the arbitration board nominated by the two appointed arbitrators had previously drafted the Civil Code for the Ethiopian Government, the prevailing party.[261] Baruch-Foster raised this factor six months after the award was made, arguing that the selection violated the arbitration agreement which provided that the third arbitrator should have "no direct or indirect connection with either party."[262]

The District Court denied Baruch-Foster's application for discovery and confirmed the award, holding that Baruch-Foster had waived its right to challenge the composition of the arbitral tribunal.[263] The Court of Appeal also confirmed the award on the basis that Baruch-Foster, despite having been given time, had not supported its allegations with substantiated evidence. The court stated that "a loser in arbitration cannot freeze the confirmation proceedings in their tracks and indefinitely postpone judgment by merely requesting discovery ... for any reason other than delay."[264]

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[259] Pieter Sanders, *supra* note 144 at 54; Albert van den Berg, *supra* note 16 at 324.

[260] 535 F. 2d. 334, *supra* note 102.

[261] *Ibid.*, at 335.

[262] *Ibid.*

[263] *Ibid.*, at 337.

[264] *Ibid.*

In *Al Haddad Bros. Enterprises Inc.* v. *M/S Agapi*,[265] the arbitration agreement provided for the appointment of two arbitrators, one by either side or by an umpire if the appointed arbitrators failed to agree.[266] The defendant nominated its own arbitrator and gave notice of that to the plaintiff. When the plaintiff failed to nominate an arbitrator, the defendant gave notice that the arbitration would proceed with a sole arbitrator.[267] After the award was made, which went in favour of the defendant, the plaintiff challenged the enforcement of the award for failure to comply with the procedure in the arbitration agreement.[268]

The court found that under the British arbitration statute, a sole arbitrator appointed by one of the parties may decide a dispute when the other party fails to appoint an arbitrator.[269] Thus, the court confirmed the award holding that the New York Convention does not preclude recognition of "an award which although not in accord with parties' agreement, complied with the laws of the country where the arbitration occurred."[270]

Also in the recent case of *Industrial Risk Insurers* v. *M.A.N. Gutehoffnungshutte*,[271] the respondent argued that the procedures adopted by the arbitral panel were not in accordance with the parties' arbitration agreement. The respondent contended that the panel's consideration of the contents of a technical report which was provided by the applicant at a

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[265] 635 F. Supp. 205 (D. Del. 1986).

[266] *Ibid.*, at 207.

[267] *Ibid.*

[268] *Ibid.*, at 209.

[269] *Ibid.*, at 210.

[270] *Ibid.*

[271] 141 F. 3d 1434 (11th Cir. 1998).

relatively late date violated the rules of the American Arbitration Association which were the agreed rules of procedure for the arbitration. It also argued that the panel should not have heard the testimony of a piping expert who had previously been retained by the applicant.[272]

The court rejected the respondent's argument, holding the view that while the report was provided very shortly before the commencement of the arbitration, it was not admitted into evidence by the arbitrators until about two months latter. The court also noted that the respondent objected to the admission of the report at that time and was allowed to cross-examine the expert about his conclusions based on the report. The respondent also was allowed to rebut the expert testimony with testimony from its experts.[273] Furthermore, the court observed that the rules referred to did not contain any certain deadline. Therefore, it concluded that the arbitrators was left with discretion to require the exchange of evidence, how and when they see fit. As such, the arbitrators could not be held to have violated the rules to which the parties had agreed to.[274]

To date, no Canadian decisions have been made involving the Article V(1)(d) defence.

4.5.1.d.i. *Commentary on Article V(1)(d)*

Notwithstanding the debate on the drafting of this provision at the New York Conference, Article V(1)(d) is seldom invoked to block recognition of an award. This is attributed to the use of arbitration rules of a specific arbitral institution to conduct the arbitral

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[272] *Industrial Risk Insurers, supra* note 271 at 1442-1443

[273] *Ibid.*, at 1443.

[274] *Ibid.*, at 1444. See Article 19(3), *International Arbitration Rules of the American Arbitration Association*, as amended and effective on April 1, 1997, <http:www.adr.org.>

proceedings.[275] The U.S. court in *Baruch-Foster* was reluctant to deny enforcement of the arbitral award on this ground, even though the court was seised with the fact that the disputed arbitrator had some connection with one of the parties.[276] The court, determined to uphold the pro-enforcement objective of the Convention, insisted on an affirmative showing of good faith in support of the challenge of the arbitrator's appointment.[277]

In *Al Haddad Bros*, although the parties agreed on the composition of the arbitration panel, they did not provide for a situation where one of the parties may decline to appoint its own arbitrator. The court, not anxious to deny enforcement of the award, invoked the law of the place of arbitration to play a complementary role, that is, to fill the lacuna in the arbitration agreement.[278]

Also, the court in the *Industrial Risk Insurers'* case found that the report was provided about three days before the commencement of the proceedings. However, it was hesitant to deny enforcement of the award. On the contrary, the court noted that arbitration proceedings "need not follow all the 'niceties' of the ... courts; [they] need provide only a fundamentally fair hearing",[279] which the court found to have been achieved by the arbitrators.

Although there is no Canadian reported case on the Article V(1)(d) defence, it is my

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[275] Albert van den Berg, *supra* note 16 at 323.

[276] Baruch-*Foster*, *supra* note 102 at 337. The arbitrator, Professor Rene David, submitted an affidavit to the court confirming that he worked for the Ethiopian government on contract between 1954 - 1958.

[277] *Baruch-Foster Corp.*, *ibid.*

[278] See Albert van den Berg, *supra* note 16 at 325, commenting on the Italian case of *S.A. Pando Compania Naviera* v. *S.a.S. Filmo*, which was decided on similar facts.

[279] *Industrial Risk Insureres*, *supra* note 271 at 1443, (quoting *Grovner* v. *Georgia-Pacific*, 625 F. 2d 1289, 1290 (5th Cir Unit B 1980).

view that the Canadian courts will interpret this defence narrowly when they are faced with a relevant case if the court is convinced that the composition of the arbitral panel and proceedings show proper representation of the parties.

4.5.1.e. *Award is not Binding, Has Been Set Aside or Suspended*

Under Article V(1)(e) of the New York Convention and Article 36(1)(a)(v) of the Model Law the losing party can challenge the enforcement of the award because:

> The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[280]

Thus, Article V(1)(e) of the Convention contains two grounds for refusal to enforce arbitral awards, first, if the award has not yet become binding on the parties and, second, if the award has been set aside or suspended in the place where it was made.

However, the Convention failed to define the exact meaning of a "binding" award.[281] The only indication from the various views expressed at the New York Conference is that the word should not be interpreted to require a double *exequatur*.[282] Commentators hold the view that an award is "binding" under the Convention if no ordinary recourse against the award is available, that is, there is no further resort to an arbitral appeals tribunal.[283]

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[280] New York Convention, *supra* note 7, Article V(1)(e); Model Law, *supra* note 8, Article 36(1)(a)(v).

[281] Paolo Contini, *supra* note 2 at 303.

[282] *Ibid.*, at 304.

[283] See Pieter Sanders, "A Twenty Years' Review of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards" (1979) 13 International Lawyer 269 at 275; Gerald Aksen, "American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1971) 1 Southwestern University Law Review 1 at 11.

The fact that recourse may be had to the court does not prevent the award from being "binding." This position has received judicial support in the U.S. in the case of *Fertilizer Corporation of India.*[284] In that case, IDI argued that since the award was the subject of an appeal in an Indian court, the award could not be considered binding in the United States. The court rejected this argument holding that:

> the award will be considered "binding" for the purposes of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact that recourse may be had to a court of law does not prevent the award from being "binding." This provision should make it more difficult for an obstructive loser to postpone or prevent enforcement by bringing, or threatening to bring, proceedings to have an award set aside or suspended.[285]

On the other hand, if recourse to the court means that the award is not yet binding, Professor Pieter Sanders has queried what purpose the special regulation in Article VI of the Convention serves if, for example, commencement of an action for setting aside the award would prevent the award from becoming binding.[286] Article VI of the Convention provides that the enforcing court may adjourn the decision on the enforcement of an award if an application for setting aside the award has been made to a court at the place where the award was made.[287] Thus, if a recourse against the award, i.e. an application for setting aside the award, means that the award is not binding, then Article VI of the Convention will be unnecessary because the successful party cannot bring an action to enforce an award which

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[284] 517 F. Supp. 948, *supra* note 58.

[285] *Ibid.*, at 958 (quoting Gerald Aksen, *ibid.*, at 11).

[286] Pieter Sanders, *supra* note 283 at 275.

[287] See also Model Law, *supra* note 8, Article 36(2).

is not yet binding as a result of the pending application for setting aside the award.

Therefore, even though the court in *Fertilizer Corporation of India* observed that a court action does not mean that the award is not binding, the court adjourned enforcement of the award under Article VI "in order to avoid the possibility of an inconsistent result should the Indian court hold that the award was invalid."[288] The court, however, ordered IDI to post a bond to secure the full amount of the award.[289]

In *Europcar Italia, S.p.A.* v. *Maiellano Tours, Inc.*,[290] the U.S. Court of Appeals remanded the case to the District Court to reconsider its decision not to adjourn the enforcement proceedings pending the outcome of the Italian appeal. The court was of the view that "where a parallel proceeding is ongoing in the originating country and there is a possibility that the award will be set aside, a ... court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings."[291]

Also, in the Canadian case of *Europcar Italia S.p.A.* v. *Alba Tours International Inc.*,[292] the court citing respect for international comity adjourned, *sine die*, the application for the enforcement of the arbitral award made in Italy pending a determination of the appeal in the Italian courts.[293] The court was of the view that "the respondent would have suffered

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[288] *Fertilizer Corporation of India*, *supra* note 58 at 962.

[289] *Ibid.*

[290] 156 F. 3d 310 (2nd Cir. 1998).

[291] *Ibid.*, at 317.

[292] Unreported, (1997) O.J. No.133 (Ont. Ct. Gen. Div.), *supra* note 112.

[293] *Ibid.*, at para 22.

extreme prejudice if the award were enforced in Ontario only to have the arbitrator's award reserved in Italy."[294] The court also ordered the respondent to provide security.

The second element of Article V(1)(e) requires that an award which has been set aside or suspended by a court where the award was made or under the law of which the award was made should not be enforced in another country.[295] It is expected that where the law under which the award was made is different from the place of arbitration, the party seeking to set aside an award must elect to proceed under one of the options.

The Convention as well as the Model Law did not explain what is meant by a "suspended award."[296] It has been suggested that it refers "presumably to a suspension of the enforceability of enforcement of the award by the court in the country of origin."[297] One instance where an award may be suspended by the court where the award was made is under Article 34(4) of the Model Law. Under this provision, the court may suspend the setting aside application and order a resumption of the arbitral proceedings in order to eliminate the grounds for setting aside. Where such order is made, this will effectively suspend the initial award.

Also, the Convention does not provide the grounds for setting aside an award. But the Model Law lists the grounds for challenging the recognition and enforcement of awards stated in Article V of the Convention (except, of course, paragraph [e]), as bases for the

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[294] *Alba Tours International, supra* note 292 at para 23.

[295] Pieter Sanders, *supra* note 144 at 56; Albert van den Berg, *supra* note 16 at 349; Leonard V. Quigley, *supra* note 24 at 1069.

[296] Kenneth T. Ungar, *supra* note 109 at 749.

[297] Albert van den Berg, *supra* note 16 at 351.

setting aside of an award by the court where the award was made.[298]

4.5.1.e.i. Effect of award set aside

The second paragraph of Article V(1)(e) which provides that awards which have been set aside may be denied enforcement was a response to concerns that such awards should not be given effect in one country when they are not binding under the law where they were made.[299] While the New York Conference was determined to eliminate the requirement of judicial confirmation of awards in their country of origin, the Conference did not want another country to enforce an award after it had been set aside by a competent authority in the place of arbitration or under the law governing the arbitration.[300]

Thus, if an award has been set aside, it has been argued that such award no longer exists and therefore the courts should refuse its enforcement.[301] Enforcing a "non-existing award" it is submitted, "would be an impossibility or even go against the public policy of the country of enforcement."[302] Dr. Albert Jan van den Berg notes that:

> The disregard of annulment of the award ... involves basic legal concepts. When an award has been annulled in the country of origin, it has become non-existent in that country. The fact that the award has been annulled implies that the award was legally rooted in the arbitration law of the country of origin. How then is it possible that courts in another country can consider the same award as still valid? Perhaps some theories of legal

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[298] Model Law, *supra* note 8, Article 34.

[299] Leonard V. Quigley, *supra* note 24 at 1069.

[300] Hamid G Gharavi, "Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention" (1998) 6 Journal of Transnational Law & Policy 93 at 96.

[301] Pieter Sanders, *supra* note 144 at 57.

[302] *Ibid.*

> philosophy may provide an answer to this question, but for a legal practitioner this phenomenon is inexplicable. It seems that only an international treaty can give a special legal status to an award notwithstanding its annulment in the country of origin.[303]

The above position represents the traditional view which holds that annulment of an award should be recognised in all other countries. A contrary view argues that annulment of an award in the country of origin should not preclude its enforcement anywhere else in the world.[304] This represents purportedly the "modern" view. The latter group finds support for their position on the use of the word "may" in Article V of the New York Convention which invariably implies the exercise of discretion whether or not to enforce an annulled award. This school of thought contrasts the language of Article V with the affirmative "shall" and "shall not" used in Articles III and VII of the New York Convention.

The "modern" group expresses the view that the drafters' change in choice of language between Article V, on the one hand, and Articles III & VII, on the other hand, was intentional. The combined effect is that a contracting state shall recognise and enforce arbitral awards that meet the prerequisites of the Convention, while the Convention (under Article VII) shall not deprive the successful party of its right to enforce the award under the domestic law of the enforcing country.[305] In other words, the modern group holds the opinion that an award that has been set aside in the place where it was made may be enforced in another

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[303] Albert Jan van den Berg, "Annulment of Awards in International Arbitration" in R. Lillich & C. Brower, eds., *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?* (New York: Transnational Publishers Inc., 1992) 133 at 161.

[304] See for example, Gary H Sampliner, "Enforcement of Nullified Foreign Arbitral Awards" (1997) 14 Journal of International Arbitration 141; Jan Paulsson, "Rediscovering the New York Convention: Further Reflections on Chromalloy" (1997) 12 No. 4 Mealey's International Arbitration Report 20.

[305] Gary H Sampliner, *ibid.*, at 149.

country if the enforcing court deems it appropriate. This group concludes that adopting its interpretation of Article V(1)(e) will coincide with the pro-enforcement bias of the Convention.

Considering the uniformity objective of the Convention, the drafters may not have anticipated that a nullified award could be enforced in other countries. However, the language of Article V(1)(e) does not seem to expressly preclude this possibility. Interestingly, the courts have yet to enforce an award that has been set aside under the provisions of the Convention. The argument by the modern group that a U.S. District Court decision and French court decisions provide support that an award that has been set aside could be enforced under the Convention is doubtful. The decisions referred to, as will be shown shortly, were made under the national arbitration laws of those states dealing with domestic awards, and not under the New York Convention.

The U.S. District Court considered the issue of recognising an award that has been set aside in *In the Matter of the Arbitration of Certain Controversies Between Chromalloy Aeroservices* v. *The Arab Republic of Egypt.*[306] The case involved a military procurement contract between an American corporation, Chromalloy AeroServices (CAS), and the Egyptian Government (ARE), signed in 1988.[307] In 1991, ARE terminated the contract and CAS initiated arbitration proceedings. The arbitration proceedings was held in Cairo, Egypt under Egyptian law as provided in the arbitration agreement. A majority of a three-member

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[306] 939 F. Supp. 907 (D.D.C. 1996).

[307] *Ibid.*, at 908.

arbitral tribunal rendered an award in favour of CAS.[308]

On October 28, 1994, CAS petitioned the U.S. District Court for enforcement of the award. Shortly thereafter, ARE filed a petition seeking nullification of the award before the Egyptian Court of Appeal on the ground that the arbitral tribunal failed to apply the law agreed by the parties.[309] ARE alleged that the Egyptian law applicable was the "administrative law" of Egypt, whereas the arbitral tribunal applied the Egyptian Civil Code. The Egyptian Court of Appeal upheld ARE's petition and initially suspended the enforcement of the award and later, by order dated December 5, 1995, nullified the award.[310]

Notwithstanding the setting aside of the award in Egypt, the U.S. District Court granted the petition of CAS for enforcement of the award. The court stated that even though Article V(1)(e) of the Convention allows the court to exercise its discretion whether or not to refuse enforcement of the award, it preferred to apply the U.S. Federal Arbitration Act,

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[308] *Chromalloy*, *supra* note 306 at 908.

[309] *Ibid.*

[310] *Ibid.* The Egyptian Court of Appeal based its decision on the grounds that the award "applied the rules of the Egyptian civil code to the exclusion of the administrative law." The court held that in doing so, the arbitral tribunal had failed to apply properly the law agreed by the parties. Under *Egyptian Law of Arbitration*, Law No. 27 of 1994, based on the UNCITRAL Model Law, Article 53(1) which contains the same grounds for setting aside an award as contained in the Model Law (Article 34), includes two additional provisions:
An action to procure the nullity of the arbitral award is admissible only in the following cases:
(d) *if the arbitral award excluded the application of the law agreed upon by the parties to govern the subject matter in dispute;* ...(emphasis added).
(g) if the arbitral award itself or the arbitration proceedings affecting the award contain a legal violation that causes nullity.
See Gary H. Sampliner, *supra* note 114 (citation omitted).

chapter 1,[311] allegedly incorporated by reference under Article VII of the Convention.[312]

The court then considered whether the award was enforceable under the U.S. Federal Arbitration law despite its nullification in Egypt. It observed that under the U.S. law the setting aside of an award does not constitute a ground for non-enforcement.[313] The court opined that the alleged misapplication of the Egyptian law by the arbitral tribunal "at worst constitutes a mistake of law, and thus not subject to review by this court."[314] It therefore concluded that the award was valid as a matter of U.S. law and that it need not grant *res judicata* effect to the decision of the Egyptian Court of Appeal.[315]

Before the U.S. action, CAS had petitioned for enforcement of the award in France. On May 4, 1995, the Tribunal de Grande Instance granted *exequatur* (declaration of enforcement) to CAS. After the nullification of the award in Egypt, ARE asked the Paris court to overturn the *exequatur*. The Court declined, holding that Article VII of the Convention allows the application of French law which does not recognise foreign annulment of an award as a ground to refuse enforcement of the award.[316] The court stated that since

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[311] Chapter 1 of the FAA deals with the enforcement of domestic awards.

[312] *Chromalloy, supra* note 306 at 908. Article VII of the New York Convention, *supra* note 7, provides: The provisions of the ... Convention shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law ... of the country where such award is sought to be relied upon.

[313] *Chromalloy, ibid.*, at 910. The court noted that the *Federal Arbitration Act*, 9 U.S.C. c.1, s. 10 provides for vacation of award only on grounds of fraud, corruption, bias, procedural misconduct or exceeding of the arbitrator's power, including manifest disregard of the law.

[314] *Ibid.*, at 911.

[315] *Ibid.*, at 914.

[316] The *French New Code of Civil Procedure*, Article 1502, which deals with the enforcement of international awards, does not contain the grounds for refusal mentioned in Article V(1)(e) of the Convention. See Hamid G. Gharavi, "The Legal Inconsistencies of Chromalloy" (1997) 12 Mealey's Int'l Arbitration Reports 21.

the French law was more favourable than the Convention, the Convention had to be "put to the side" in place of a more favourable law.[317]

4.5.1.e.ii. *Commentary on Article V(1)(e)*

It was envisaged that when an award has been set aside by a competent authority at the place of arbitration, such order shall be accorded extraterritorial effect insofar as Article V(1)(e) precludes its enforcement in other contracting states.[318] The New York Convention, however, places the ultimate authority on the enforcing court. This discretion has yet to be exercised negatively to refuse enforcement of arbitral awards in the U.S. and Canada. The courts in both countries have granted the losing party an adjournment of the enforcement proceedings pursuant to Article VI of the Convention, pending the outcome of an application for setting aside an award.[319]

However, in *Chromalloy*, the U.S. and the French courts invoked Article VII of the Convention to purportedly render the Convention redundant and apply their domestic laws to justify the enforcement of the award. Indeed, before *Chromalloy* the French courts had, in at least three cases, gone beyond the terms of the Convention by declaring that the setting aside of an award does not prevent its enforcement in France.[320] In effect, these cases were

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[317] See Jan Paulsson, *supra* note 304 (citation omitted).

[318] Leonard V. Quigley, *supra* note 24 at 1066.

[319] See the following cases: *Fertilizer Corp. of India*, *supra* note 58; *Europcar Italia S.p.A.*, *supra* note 290; *Spier* v. *Calzaturifcio Tecnica, S.P.A.*, 637 F. Supp. 871 (S.D.N.Y. 1987); *Caribbean Trading & Fid. Corp.* v. *Nigerian National Petroleum Corp.*, No. 90-4169, 1990 U.S. Dist. LEXIS 17198 (S.D.N.Y. December 18, 1990) and *Gesco Ltd.* v. *Hang Yang Corp.* (D.N.J. Nov. 21, 1986), reprinted in (1990) 15 Yearbook Commercial Arbitration 575, *Europcar Itailia S.p.A.* v. *Alba Tours*, *supra* note 112.

[320] See Hamid G. Gharavi, *supra* note 304 at 96. See also the following cases, *Societe Pabalk Ticaret Ltd. Sirketi* v. *Societe Anonyme Norsolor*, translated in (1986) 11 Yearbook Commercial Arbitration 484; *Polish*

not decided under the New York Convention or the Model Law.

But it may be noted that, in declining to exercise their discretion under Article V(1)(e), the courts have "left for another day the question of when, under Article V(1)(e), the courts of the enforcing countries should exercise their discretion to enforce a nullified foreign award."[321]

In exercising their discretion, the courts should be inclined to give effect to awards set aside based on the provisions of Article 34 of the Model Law (which replicates Article V of the Convention and Article 36 of the Model Law), as opposed to awards set aside on local peculiarities. This is because Article 34 of the Model Law, by repeating the same grounds for challenging enforcement of an award under Article V of the Convention, has now streamlined the bases for setting aside an award and excludes local considerations.

Also, since enforcing awards that have been set aside will inevitably require judicial review of the foreign judgment, the enforcing courts should where possible refrain from conducting such judicial review. Where a nullified award is enforced in another state, the message is that of contempt for the judicial system of the country that set aside the award and such contempt may be reciprocated. The impact of this development could be chaotic for international commercial arbitration.

4.5.2. *Arbitrability and Public Policy Defences*

Pursuant to Article V(2) of the New York Convention and Article 36(1)(b)(i) & (ii)

Ocean Lines v. *S.A. Jolasry*, translated in (1994) 19 Yearbook Commercial Arbitration 662; *Societe Hilmarton* v. *Societe O.T.V.*, translated in (1995) 20 Yearbook Commercial Arbitration 663.

[321] Gary H. Sampliner, *supra* note 114 (citation omitted).

of the Model Law, the enforcing court may refuse the enforcement of an award if the court is of the view that the subject matter of the award is non-arbitrable or the enforcement of the award would be contrary to the public policy of the state. The defences are recognised by the court *ex officio* if it "finds that" they are applicable.[322] Mr. Leonard V. Quigley has argued that these defences can also be raised by the parties.[323] In fact, in most of the cases which have considered the arbitrability and public policy defences, the defences were raised by the opposing parties. The successful parties do not object to this practice and the courts have inferentially accepted that the parties may raise these defences. But this is not in conformity with the provisions of the New York Convention and the Model Law which clearly include these defences under a separate subparagraph. The opposing party has no right to raise any of the defences or any obligation to prove their violation.[324]

Suffice it to note that by virtue of Article 34(2)(i-ii) of the Model Law,[325] the ambit of these defences has been extended to courts in the country of origin of the award. Thus, courts in the states which have adopted domestic arbitration laws based on the Model Law can now *ex officio* apply these defences to set aside an award. This is because Article 34 of the Model Law, which contain the grounds for setting aside an award at the place where the award was made, provides in sub-paragraphs (2)(i) & (ii) that the court may on its own, set

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[322] Paolo Contini, *supra* note 2 at 304; Pieter Sanders, *supra* note 144 at 56.

[323] Leonard V. Quigley, *supra* note 24 at 1070.

[324] See *Schreter* v. *Gasmac Inc.*, *supra* note 80.

[325] Model Law, *supra* note 8, Article 34(2)(b)(i-ii) provides that on application for setting aside an award, the court where the award was made may on its own set aside the award if it is of the opinion that the subject matter of the award is not arbitrable under the laws of the state or if the award is in conflict with the public policy of the state.

aside the award based on the arbitrability and public policy provisions.

Second, these defences are relics of the otiose Geneva treaties. That they are retained in modern international arbitration instruments speaks volumes of the apron strings with which international commercial arbitration is tied to national laws. Arguing in support of state control of international commercial arbitration through the defence of public policy review of arbitral awards, a commentator observed that since arbitral awards are not self-executory:

> It follows from the fact that the power to enforce awards ultimately belongs to the state that, acting through the courts, the state must have authority to scrutinize at any rate the lawfulness of an arbitration award. Law enforcement is no longer a private matter in any civilized community. If, acting through its agents, public authority is to enforce arbitration awards, public authority must also be in a position to check on the foundations and limitations of arbitration.[326]

Thirdly, the nonarbitrability defence is often treated as part of the public policy defence due largely to the "catch all" nature of the public policy defence.[327] However, "although the defences share similar origins and judicial treatment, the defence of non-arbitrable subject matter now has particularised application."[328] The non-arbitrable subject matter defence refers to certain categories of disputes that are, under the domestic law of the forum state, expressly prohibited from submission to arbitration.[329] These kinds of disputes

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[326] Joel Junker, "The Public Policy Defence to Recognition and Enforcement of Foreign Arbitral Awards" (1977) 7 California Western International Law Journal 228 at footnote 4.

[327] Pieter Sanders, *supra* note 144 at 56; Joel Junker, *ibid.*, at 232.

[328] Joel Junker, *ibid.*, at 235.

[329] Heather R. Evans, "The Nonarbitrability of Subject Matter Defence to Enforcement of Foreign Arbitral Awards in United States Federal Courts" (1989) 21 New York University Journal of International Law & Policy 329 at 332.

are considered incapable of compromise lawfully by way of accord and satisfaction.[330]

However, no state statute can exhaustively provide for non-arbitrable subject matters. In other words, apart from specific prohibitions on arbitration of certain matters such as matrimonial disputes, competition law, bankruptcy law, intellectual property law and other matters that boarder on illegality (criminal acts) or immorality (prostitution or slavery), what is non-arbitrable is inexhaustible.[331] But non-arbitrable subject matters should be a narrow field because, if not, international commercial arbitration will not be very useful.

On the other hand, the public policy defence is extremely generic and unspecific in nature.[332] What is against the public policy of a state depends on what subject matter claims national courts insist on reserving to themselves.[333] Also, public policy may be categorised into domestic and international. While international public policy is relatively stable, domestic public policy changes with the changing mood of the society and differs from one country to another.[334] In effect, what amounts to a state public policy really depends on how the courts perceive the disposition of the nation at the material time.

The above differences between the non-arbitrable and public policy defences notwithstanding, it is appreciated that often the concept of arbitrability is, in fact, also a public

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[330] See *Kano State Urban Development Board* v. *Fanz Construction Co. Ltd.* (1990) 4 Nigerian Weekly Law Report (pt. 142) 1 at 32-33.

[331] Ljiljana Biutovic, "Impact of the Adoption of the Model Law in Canada: Creating a New Environment for International Arbitration" (1998) 30 Canadian Business Law Journal 376 at 400.

[332] Joel Junker, *supra* note 326 at 231.

[333] Robert K. Paterson, "Implementing the UNCITRAL Model Law" (1993) 10 Journal of International Arbitration 29 at 43.

[334] Andrew Okekeifere, "The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria" (1997) 14 Journal of International Arbitration 223 at 236.

policy limitation upon the scope of arbitration.[335] A subject matter that is not arbitrable is likely to also be against the public policy of a state. Thus, it has been the practice of most national courts to hold that certain subject matters against the public policy of their state are not arbitrable.[336] Due to this similarity, the non-arbitrability and public policy defences are often examined jointly by the courts as one defence. However, these defences are considered separately in this study.

4.5.2.a. *Arbitrability Defence*

Article V(2)(a) of the Convention and Article 36(1)(b)(i) of the Model Law state that:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
> (a) the subject matter of the difference is not capable of settlement by arbitration under the Law of that country.[337]

The arbitrability defence has been categorised into objective or subject-matter arbitrability, on the one hand, covering disputes which have been subtracted from arbitration by the applicable national law and, on the other hand, subjective arbitrability dealing with the question of what the parties have agreed to arbitrate.[338]

4.5.2.a.i. *Subject Matter Arbitrability*

As noted above, this defence has its historical origin in Article 1(b) of the Geneva

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[335] Alberta van den Berg, *supra* note 16 at 360; Redfern & Hunter, *supra* note 13 at 105.

[336] See *Wilko* v. *Swan* , 346 U.S. 427 (1953).

[337] New York Convention, *supra* note 7, Article V(2)(a); Model Law, *supra* note 8, Article 36(1)(b)(i).

[338] See Bernard Hanotiau, "What Law Governs the Issue of Arbitrability? (1996) 12 Arbitration International 391; Ljiljana Biukovic, *supra* note 331 at 400; David P. Stewart, *infra* note 363 at 187.

Convention.[339] It is also duplicated in the New York Convention Article II(1)[340] and the Model Law Article 1(5).[341] A general theme running through the above provisions is that the Convention and the Model Law recognise that national laws of the contracting states may exclude certain subject matter from settlement through arbitration.

At the New York Conference, France argued that domestic standards of arbitrability should not be applied to international arbitration; however, Article V(2)(a) was adopted by the Conference.[342] It has been suggested that the inclusion of Article 1(5) of the Model Law was made to assuage the fear of some countries that the expansive definition of "commercial" relationships in Article 1(1) of the Model Law will not be construed as meaning that any dispute arising therefrom would be capable of settlement by arbitration.[343]

Thus, the New York Convention and the Model Law expressly authorise the courts of contracting states to refuse enforcement of an award if the grounds of a dispute cannot be settled by arbitration under the domestic law of the enforcing court. The facts that the award was made in a foreign country, under a foreign law that recognises the subject matter as

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[339] Geneva Convention, *supra* note 23 Article 1(b) provides:
To obtain such recognition or enforcement, it shall, further be necessary: ...
(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which it is sought to be relied upon.

[340] New York Convention, *supra* note 7, Article II(1) states that:
Each Contracting State shall recognize an agreement ... to submit to arbitration ... concerning a subject matter capable of settlement by arbitration.

[341] Model Law, *supra* note 8, Article 1(5) provides:
This Law shall not affect any other law of [the] State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to the provisions other than those of this Law.

[342] Leonard V. Quigley, *supra* note 24 at 1070.

[343] Gerold Herrmann, "UNCITRAL Adopts Model Law on International Commercial Arbitration" (1986) 2 Arbitration International 2 at 4.

arbitrable and that the parties voluntarily agreed to submit the dispute to arbitration are ignored. This defence has been the subject of judicial interpretation.

In the U.S., in *Parsons & Whittemore*,[344] the defendant abandoned its contract in Egypt because Egypt severed diplomatic relations with the U.S.[345] In an action to enforce an award resulting from the unilateral termination of the contract, the defendant (a U.S. corporation) argued that the dispute was non-arbitrable since it involved U.S. foreign policy. The defendant further contended that such dispute should not be "placed at the mercy of foreign arbitrators 'who are charged with the execution of no public trust' and whose loyalties are to foreign interests."[346]

The Court of Appeal rejected the argument and affirmed the decision of the lower court which confirmed the enforcement of the award. The court stated that "the mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute not arbitrable."[347] The court was also of the view that "because acts of the United States are somehow implicated in a case, one cannot conclude that the United States is vitally interested in its outcome."[348] The court noted that in *Scherk* v. *Alberto-Culver Co.*,[349] a case far more prominently displaying public features

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[344] *Parsons & Whittemore*, *supra* note 148.

[345] *Ibid.*, at 972.

[346] *Ibid.*, at 975 (the court quoting Brief for Appellant at 23).

[347] *Parsons & Whittemore*, *supra* note 148 at 975.

[348] *Ibid.*

[349] *Scherk*, 417 U.S. 506, *supra* note 29 at 515. The U.S. Supreme Court ordered the enforcement of the arbitration agreement which provided for arbitration of disputes arising out of federal securities.

than the instant case, the U.S. Supreme Court ruled in favour of arbitration.[350] The Court therefore concluded that non-arbitrable subject matter refers to those categories of claims having "special national interest in judicial, rather than arbitral, resolution of the ... claim underlying the award."[351]

Similarly, in the Canadian case of *Kanto Yakin* v. *Can-Eng*,[352] the respondent (an Ontario Corp) alleged that there had been a fundamental breach of the licensing agreement by the Japanese company (Kanto Yakin) and that such a dispute was not capable of settlement by arbitration under the law of Ontario and could only be decided by a court of competent jurisdiction.[353] The court was not persuaded by the argument and ordered enforcement of the award, holding that the dispute was arbitrable and that the alleged fundamental breach ought to have been raised before the arbitration tribunal.[354]

However, the non-arbitrability defence was successfully invoked to block the enforcement of an arbitral award in the U.S. in *Libyan American Oil Co.(LIAMCO)* v. *Socialist People's Libyan Arab Jamahirya*.[355] In 1955, LIAMCO and the Libyan Government entered into petroleum concessions which contained an arbitration clause. Between 1973 and 1974, Libya nationalised LIAMCO's rights under the concessions and certain of its oil drilling

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[350] *Parsons & Whittemore*, *supra* note 148 at 975.

[351] *Parsons & Whittemore*, *ibid.*, at 975. See also Joel Junker, *supra* note 326 at 234 (footnote 45).

[352] *Can-Eng*, *supra* note 170.

[353] *Ibid.*, at 789.

[354] *Ibid.*, at 791.

[355] 482 F. Supp. 1175 (D.D.C. 1980).

equipment.[356] LIAMCO rejected the terms of the nationalisation and proceeded to arbitration which ended in its favour. Libya did not attend the arbitration proceeding and in this case resisted the enforcement of the award on grounds of sovereign immunity and Act of State.[357]

The court rejected the defence of sovereign immunity holding that by agreeing to arbitration under a foreign law, Libya had waived its immunity.[358] In respect of the second defence that the nationalisation of LIAMCO's assets was an act of state, the court expressed the view that the enforcement of the award would inevitably require it to review the terms of the nationalisation, an action which would violate the act of state doctrine.[359] The court thus concluded that since it could not have compelled arbitration in this instance, it could not order the enforcement of the award.[360] The case was however settled before LIAMCO's appeal could be heard.[361]

In Canada, although the courts have considered the defence of arbitrability, they have yet to declare a subject matter of an international commercial dispute non-arbitrable under the laws of Canada. The courts have held that if the claim in question relies on the existence of

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[356] *LIAMCO*, *supra* note 355 at 1176.

[357] *Ibid.*, at 1177. Libya argued that the court lacked jurisdiction to entertain the matter and that even if the court found jurisdiction, the act of state doctrine barred enforcement of the award.

[358] *Ibid.*, at 1178. The court supported its view with the case of *Ipitrade International, S.A.* v. *Federal Republic of Nigeria*, 465 F. Supp. 824 (D.C. Cir. 1978) at 826. The case concerned an action for enforcement of the arbitral award based on breach of contract. The court held that the foreign sovereign's "agreement to adjudicate all disputes arising under the contract in accordance with Swiss law and by arbitration under ICC rules consitute[d] a waiver of sovereign immunity under the Act."

[359] *LIAMCO*, *supra* note 355 at 1178.

[360] *Ibid.*, at 1178-79.

[361] *LIAMCO*, 684 F. 2d 1032 (D.C. Cir. 1981).

a contract between the parties, and the parties have agreed to arbitrate, the dispute should go to arbitration.[362]

4.5.2.a.ii. *Subjective Arbitrability*

Case law on the non-arbitrability defence indicates that it ordinarily arises in connection with the enforcement of an arbitration agreement.[363] The parties often allege that the subject matter of the dispute, or part of it, was not covered by the arbitration agreement and to that extent is non-arbitrable. This is what has been referred to as subjective arbitrability, that is, dealing with the question of what the parties have agreed to arbitrate.[364]

Although this study concerns the enforcement of arbitral awards, to appreciate the defence of non-arbitrability some cases on enforcement of arbitration agreements are considered here. U.S. and Canadian courts concerned with the unique nature of international commercial disputes have recognised the significance of arbitration agreements and have therefore allowed international concerns to prevail over domestic interests.

The preference to uphold international arbitration agreements even where such decision may not have been reached in a purely domestic context was shown in *Scherk* v. *Alberto-Culver*.[365] The U.S. Supreme Court compelled arbitration of a federal securities

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[362] Can-Eng, *supra* note 170 at 791, *Kaverit Steel & Crane Ltd.* v. *Kone Corp.* (1992) 120 A.R. 346 at 350 (C.A.).

[363] David P. Stewart, "National Enforcement of Arbitral Awards under Treaties and Conventions" in Lillich & Brower, eds., *International Arbitration in the 21st Century, supra* note 303, 163 at 187.

[364] See Bernard Hanotiau, "What Law Governs the Issue of Arbitrability? (1996) 12 Arbitration International 391; Ljiljana Biukovic, *supra* note 331 at 400; David P. Stewart, *ibid.*, at 187.

[365] 417 U.S. 506, *supra* note 29.

dispute holding that the special considerations and policies underlying a "truly international agreement," call for a narrower view of non-arbitrability in international than the domestic context.[366] This can be contrasted with the U.S. Supreme Court's earlier decision in *Wilko* v. *Swan*[367] wherein federal securities claims were held to be non-arbitrable in the domestic setting because of the vital public interest in securities law enforcement.[368]

Similarly, in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*,[369] the court ordered arbitration of antitrust claims, holding that:

> concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[370]

On the other hand, in *American Safety Equip. Corp.* v. *J.P. Maguire & Co.*,[371] the court held that antitrust claims are non-arbitrable in a domestic setting because of strong public interest in enforcing antitrust laws.[372]

The U.S. Supreme Court recently reaffirmed its disposition to limit the defence of non-arbitrability in *Vimar Seguros Y Reaseguros* v. *M/V Sky Reefer*.[373] The court, affirming

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[366] *Alberto-Culver, supra* note 29 at 515.

[367] 346 U.S. 427 (1953).

[368] *Wilko* v. *Swan, supra* note 336 at 438.

[369] 473 U. S. 614 (1985).

[370] *Ibid.*, at 629.

[371] 391 F. 2d 821 (2d Cir. 1968).

[372] *Ibid.*, at 826-27.

[373] 115 S. Ct. 2322 (1995).

the decision of the Court of Appeal, held that disputes arising from the *Carriage of Goods by Sea Act (COGSA)*[374] are arbitrable.[375]

In Canada, the courts have held that statutory lien schemes protecting the construction industry which provide for a particular form of arbitration cannot override the Model Law. Thus, an arbitration agreement which provides for international commercial arbitration shall prevail over the arbitration procedure provided in domestic statutes.

In *Kraener Enviropower* v. *Tanar Industries,*[376] an action to enforce statutory lien rights brought under the Alberta *Builders' Lien Act,*[377] the defendant petitioned for a stay of proceedings and a reference to arbitration in Maryland under the terms of the subcontract agreement. The Alberta Court of Appeal upheld the lower court decision that the lien legislation did not prevent international arbitration of disputes involving a builder's lien.[378]

Also, in *BWV Investments Ltd* v. *Saskferco Products Inc.*,[379] a German firm entered into a subcontract agreement with BWV which provided for arbitration in Zurich under the Federal Law of Switzerland.[380] BWV registered a lien against the project property under the

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[374] *Carriage of Goods by Sea Act*, 46 U.S.C. ss. 3(8) & 1303.

[375] *M/V Sky Reefer, supra* note 373 at 2330. The U.S. Supreme Court has also extended the narrow construction of the non-arbitrable subject matter defence to domestic arbitration. See *Shearson/American Express Inc. Et Al.* v. *McMahon Et Al*, 482 U.S. 220 (1987) where the court held *inter alia* that claims arising from *Racketeer Influenced and Corrupt Organisations Act* (RICO) was arbitrable under the Federal Arbitration Act.

[376] (1994) 9 W. W. R. 228 (Alta. C.A.).

[377] R.S.A. 1980, c. B - 12.

[378] *Kraener Enviropower, supra* note 376 at 237.

[379] (1995) 2 W.W.R. 1 (Sask. C.A.).

[380] *Ibid.*, at 5.

Saskatchewan *Builders' Lien Act*[381] and commenced this action seeking relief under the lien statute. The German firm sought a stay of proceedings under Article 8 of the Model Law. The Saskatchewan Court of Appeal granted the stay, holding that there was no inconsistency between the arbitration agreement and the builders' lien legislation.[382] In addition, the Ontario Court of Appeal had earlier held in *Automatic Systems Inc.* v. *Bracknell Corp*[383] that the Ontario *Construction Lien Act*[384] does not prevent arbitration of disputes under the Model Law.[385]

4.5.2.a.iii. *Commentary on Article V(2)(a)*

As the cases above indicate, the courts have shown reluctance to allow the non-arbitrability defence, observing the importance of international business interests and comity concerns.[386] The decision in *LIAMCO* serves as an exception and has been criticised as an "unfortunate decision."[387] The commentator noted that a state should not be allowed to revoke unilaterally an agreement to arbitrate under the guise of the act of state doctrine.[388]

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[381] S.S. 1984-85-86, c. B- 7.1.

[382] *Saskferco Products Inc.*, *supra* note 379 at 19.

[383] (1994) 18 O.R. (3d) 257 (Ont. C.A.).

[384] R.S.O. 1990, c. 30.

[385] *Automatic Systems Inc.*, *supra* note 383 at 266.

[386] Christine L. Davitz, "U.S. Supreme Court Subordinates Enforcement of Regulatory Statutes to Enforcement of Arbitration Agreements: From the Bremen's License to the Sky Reefer's Edict" (1997) 30 Vanderbilt Journal of Transnational Law 59 at 75.

[387] Albert van den Berg, *supra* note 16 at 371.

[388] *Ibid.*, at 372-73.

However, following the 1988 amendments to the Federal Arbitration Act, the act of state doctrine is no longer a defence to enforcement of arbitration agreements or awards in the U.S.[389]

It is however important to note that the problem of non-arbitrability of subject matter defence becomes glaring in those cases where the subject matter of the dispute has been considered arbitrable in the place of arbitration but is held not arbitrable under the law where the enforcement of the award is sought.[390] Since the non-arbitrability defence may be raised at the enforcement of the arbitration agreement stage, a court at the place of arbitration may declare a disputed subject matter arbitrable and order the parties to arbitration. An arbitral award resulting from such arbitration may not be enforced in another country if the subject matter is considered non-arbitrable in the enforcing state. Herein lies the dilemma of the non-arbitrability defence. A successful party faced with this situation may, therefore, engage in "a certain degree of forum-shopping",[391] hoping to find a country where the defendant has assets and which does not consider the subject matter non-arbitrable.

However, judging from U.S. and Canadian courts' narrow interpretation of the non-arbitrable defence as exemplified by the cases considered in this study, it is my view that a subject matter that was declared arbitrable in the U.S. will be held to be arbitrable in Canada, and vice versa.

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[389] 9 U.S.C. s. 15 (1992).

[390] Heater R. Evans, *supra* note 329 at 332-333.

[391] Leonard V. Quigley, *supra* note 24 at 1070.

4.5.2.b. *The Forum's Public Policy Defence*

Article V(2)(b) of the Convention and Article 36(1)(b)(ii) of the Model Law also state that:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
> (b) the recognition or enforcement of the award would be contrary to the public policy of that country.[392]

The concept of public policy generally refers to a traditional escape route which allows national courts to refuse the application of an otherwise applicable foreign law or decline to enforce a foreign arbitral award or judgment.[393] In the context of international arbitration, the origin of the public policy defence dates back to the Geneva Convention.[394] The retention of the public policy defence in modern arbitration instruments was a *fait accompli*, the only debate at the New York Conference was over its scope.[395]

Beyond the attempt at defining the scope of the public policy defence, the Conference offers no certain guidelines to its construction. Hence, it has been observed that "to say that public policy prohibits arbitration in a particular instance explains little; "public policy" is a

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[392] New York Convention, *supra* note 7, Article V(2)(b); Model Law *supra* note 8, Article 36(1)(b)(ii).

[393] P. B. Carter, "The Role of Public Policy in English Private International Law" (1993) 42 International & Comparative Law Quarterly 1; Albert van den Berg, *supra* note 16 at 360.

[394] *Geneva Convention*, *supra* note 23, Article 1(e) provides:
That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

[395] See Leonard V. Quigley, *supra* note 24 at 1070-71. The debate was centred on whether to add next to "public policy", the words "or to the principles of law" as contained in the Geneva Convention or to add "the fundamental principles of law" as proposed in the 1955 *Ad hoc* Committee's Draft. The Conference however concluded that the phrase "public policy" was broad enough without the addition of any of those suggestions.

catch phrase elusive of meaning without reference to the context in which it is used."[396]

In the absence of a concrete definition and scope of the public policy defence, its interpretation and application depends entirely on the courts of contracting states to the New York Convention. To this extent, it was argued that the efficacy of the Convention is dependent on the good faith of contracting states.[397]

However, in order to promote the objectives of the Convention, U.S. and Canadian courts have interpreted this defence narrowly. In the U.S. courts, in *Parsons & Whittemore*,[398] the defendant, (a U.S. corporation) claimed that "as a loyal American citizen", it had an obligation to withdraw from its contract in Egypt following the Arab-Israeli Six Day War and deteriorating United States-Egyptian relations. It argued that its continuing with the project would have violated the national policy of the U.S.[399] The defendant therefore impressed upon the court that the enforcement of the award would contravene U.S. public policy.

The court disagreed, noting that "an expansive construction of this defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement. ... We conclude therefore that the Convention's public policy defence should be construed narrowly."[400] In an attempt to set the standard by which the public policy defence would be invoked, the court stated as follows:

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[396] Stewart E. Sterk, "Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense" (1980-81) 2 Cardozo Law Review 481 at 483.

[397] Leonard V. Quigley, *supra* note 24 at 1070.

[398] *Parsons & Whittemore, supra* note 148.

[399] *Ibid.*, at 974.

[400] *Ibid.*, at 973.

> Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum's most basic notions of morality and justice. ... In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark. To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's utility.[401]

Although the term "most basic notion of morality and justice" offers little guidance,[402] the views expressed in *Parsons & Whittemore* have become the acceptable standard by which the public policy defence has been judged.[403] In *Waterside Ocean Navigation Co., Inc.* v. *International Navigation Co.,Ltd.*,[404] the defendant alleged that the award was based on inconsistent sworn testimony of a witness for the successful party. It therefore argued that enforcement of the award would contravene U.S. policy which favours protecting the value of testimonial oath.[405] The Second Circuit Court, affirming the decision of the lower court, noted that the public policy defence:

> must be construed in the light of the overriding purpose of the Convention, which is "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."[406]

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[401] *Parsons & Whittemore, supra* note 148 at 974.

[402] Ramona Martinez, *supra* note 96 at 510.

[403] See *Fotochrome, Inc.* v. *Copal Co.*, 517 F. 2d 512 (2d Cir. 1975) where the court adopting the principle in *Parsons & Whittemore*, reversed the decision of the Bankruptcy Court that refused to recognise the award. The court while not deciding whether the U.S. bankruptcy law was a 'public policy' that precluded enforcement of foreign arbitral award, noted that since the award was a valid determination on the merits of the dispute between the parties, it was not subject to review by the Bankruptcy Court.

[404] 737 F. 2d 150 (2d Cir. 1984).

[405] *Ibid.*, at 151.

[406] *Ibid.*, at 152. (citing *Scherk* v. *Alberto-Culver Co.*, *supra* note 29 at 520).

Therefore, the court confirmed the award holding that "the assertion that the policy against inconsistent testimony is one of our nation's 'most basic notions of morality and justice' goes much too far."[407] In *Europcar Italia S.p.A.*,[408] the court noted that a fraudulently obtained arbitration agreement or award might violate public policy and therefore preclude the enforcement of an award.[409] However, in the recent case of *Aaot Foreign Economic Association* v. *International Development & Trade Services, Inc.*,[410] the respondent alleged that the enforcement of an award rendered by a corrupt tribunal would be contrary to the public policy of the United States. The court held that:

> the use of the public policy exception is not appropriate where one party to an arbitration has initiated the situation itself [offer of inducement to the tribunal] prior to the commencement of the arbitration hearing, participated thereafter fully in the arbitration, received an unfavourable award, and then alleges that the arbitral proceeding was corrupt as a means of avoiding an unfavourable result.[411]

The strong policy of enforcing arbitral awards also led the U.S. court in *Fertilizer* Corp. v. *IDI*[412] to hold that, although it would have been desirable for the arbitrator to disclose his relationship with one of the parties, the "stronger public policy ... is that which

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[407] *Watersider Ocean Navigation Co., supra* note 404 at 152. See also *Industrial Risk Insurers* v. *M.A.N. Gutehoffnungshutte*, 141 F. 3d 1434, 1144 (11th Cir. 1998), the court rejected the contention that 'side-switching', that is, testimony against a party's interest by an expert witness formerly retained by that party violates "the well-established public policy protecting ... fundamental principles of fairness and professional conduct."

[408] 156 F. 3d 310, *supra* note 290.

[409] *Ibid.*, at 315.

[410] 139 F. 3d 980 (2nd Cir. 1998).

[411] *Ibid.*, at 981.

[412] 517 F. Supp. 948 (S.D. Ohio 1981).

favours arbitration."[413] The court therefore held that recognition and enforcement of the award would not violate the public policy of United States.[414]

Also, in *Laminoirs-Trefileries-Cableries DeLens* v. *Southwire*,[415] the U.S. court accepted partial enforcement of an award which provided for interest rates, even though they were higher than what the Georgian law generally allowed. The court noted that United States "cannot have trade and commerce in world markets and international waters exclusively on [its] terms, governed by [its] laws, and resolved in [its] courts."[416] The court, however, refused to enforce the part of the award which provided for escalated interest stating that it did not reflect actual damages but constituted a penalty.[417]

In Canada, the public policy defence has been considered in a number of cases. In *Boardwalk Regency Corp.* v. *Maalouf*,[418] the Ontario Court of Appeal per Lacourciere J.A., defined the doctrine of public policy as acts which "would violate conceptions of essential justice and morality."[419] Thus, the court held that given the acceptance of gambling in

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[413] *Fertilizer* Corp. v. *IDI*, *supra* note 58 at 954-955.

[414] *Fertilizer Corp.*, *ibid.*, at 955. See also *Transmarine Seaways Corp. of Monrovia* v. *Marc Rich & Co., A.G.*, 480 F.Supp. 352 (S.D.N.Y. 1979). Marc Rich had objected to the presence of one of the arbitrators during the arbitration hearing. In an action to enforce the arbitral award, Marc Rich argued that since the presence of one of the arbitrators was improper on the grounds that the arbitrator was allegedly biased, enforcing the award would be against the public policy of U.S. The court held that the relationship in question was "far too tenuous ... to require the disqualification of an experienced and respected maritime arbitrator, particularly where Marc Rich offers no challenge to [the arbitrator's] personal integrity." Also see *Imperial Ethiopian Government* v. *Baruch-Foster Corp.*, 535 F.2d 334 (5th Cir. 1976)., *supra* note 102.

[415] 484 F. Supp. 1063, *supra* note 173.

[416] *Ibid.*, at 1069.

[417] *Ibid.*

[418] (1992) 6 OR (3d) 737 (C.A.).

[419] *Ibid.*, at 748.

Ontario, it could not be said that a judgment relating to gambling was tainted by immorality so as to require the court to refuse enforcement.[420]

In *Schreter* v. *Gasmac Inc.*,[421] the respondent resisted the enforcement of the award on the grounds that it provided for acceleration of future royalty payments.[422] The court held that because the award provided for the acceleration of royalty payments did not make its enforcement contrary to the public policy of Ontario.[423] The court noted that to:

> re-open the merits of an arbitral decision on legal issues decided in accordance with the law of a foreign jurisdiction and where there has been no misconduct, under the guise of ensuring conformity with the public policy of the province, the enforcement procedure of the Model Law could be brought into disrepute.[424]

In *M.A. Industries* Inc. v. *Maritime Battery Ltd.*,[425] the respondent argued that since the arbitrator did not take the oath prescribed by s. 10 of the New Brunswick *Arbitration Act*, confirmation of the award would be contrary to the public policy of New Brunswick. The court was not convinced and expressed its displeasure with this parochial understanding of the reach of domestic legislation in an international arbitration, holding that:

> if the respondent's argument were to prevail it would mean that an arbitrator would have to comply with the procedural requirements of every jurisdiction to which the parties might potentially look for enforcement.[426]

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[420] *Boardwalk Regency Corp.*, *supra* note 418 at 751.

[421] (1992) 7 O.R. (3d) 608, *supra* note 80.

[422] *Ibid.*, at 622.

[423] *Ibid.*, at 624.

[424] *Ibid.*, at 623.

[425] (1991) 296 A.P.R. 127 (N.B.Q.B.), affirmed (1991) 310 A.P.R. 305 (C.A.).

[426] *Ibid.*, at 136.

In *Arcata Graphics Buffalo Ltd.* v. *Movie (Magazine) Corp.*,[427] an Ontario court upheld an award which provided for interest at a rate higher than that allowed under Ontario legislation. The court was not convinced that enforcing the award would violate the public policy of Ontario. It opined that "to refuse enforcement of the award it must be contrary, not merely to the law of the forum, but to the essential fundamental morality of its community."[428]

4.5.2.b.i. *Commentary on the Public Policy Defence*

Although the public policy defence has been frequently invoked in U.S. and Canada, it has rarely been successful.[429] The U.S. and Canadian courts, and indeed courts of many countries mindful of the objective of the New York Convention and the Model Law, have been reluctant to apply the public policy defence to refuse enforcement of arbitral awards.[430]

The courts' interpretation of the public policy provision presumes that arbitration awards will be recognised and enforced. Thus, the cases have established a principle that courts of contracting states should defer to the arbitrator's resolution of the dispute whenever possible.[431]

Remarkably, in all the cases considered above, the public policy defence just like the

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[427] Unreported (Ont. Ct. of Justice - Gen. Div.), [1993] Ontario Judgments No. 568, (1994) 19 Yearbook Commercial Arbitration 268.

[428] See Robert K. Paterson, *supra* note 333 at 44.

[429] Albert van den Berg, *supra* note 16 at 366; David Stewart, *supra* note 363 at 189; Mark A. Buchanan, "Public Policy & International Commercial Arbitration" (1989) 26 American Business Law Journal 511at 519.

[430] Of the 140 cases examined by Albert van den Berg, only five resulted in refusal to enforce the award on public policy grounds, Albert van den Berg, *supra* note 16 at 366 - 367.

[431] See *Robbins* v. *Day*, 954 F. 2d 679 at 682 (11th Cir. 1992); *Davis* v. *Prudential Securities, Inc.*, 59 F. 3d 1186 at 1190 (11th Cir. 1995).

non-arbitrability defence was surprisingly raised by the parties rather than by the courts as provided in the Convention and the Model Law. While the courts curiously allowed the parties to invoke the defences, they have, however, shown commendable hesitation in upholding the two defences. Thus, the fear that the public policy defence constitutes a major potential "loophole" that may undermine the effect of the Convention and the Model Law now seems largely theoretical.[432] The present attitude of the courts is in line with the global reception of arbitration and the international public policy in favour of international commercial arbitration.

However, despite the narrow interpretation which the public policy and non-arbitrable defences currently receive from the courts, the concern that these defences may undermine the principles behind the Convention and the Model Law is not completely unfounded. A commentator has therefore reiterated that "locally accepted inhibitions and prejudices are not always appropriate in a transnational text."[433]

The main concern on retention of the public policy provision is due to its abstract, inderterminate or malleable nature, such that it can hardly fit into a stand-alone definition that will yield the same result in application.[434] On the other hand, the policy objective of the Convention and the Model Law is on uniformity of application and treatment of international commercial arbitral awards.

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[432] See Mark A. Buchanan, *supra* note 429 at 519; Karen E. Minehan, "The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?" (1995-96) 18 Loyola of Los Angeles International & Comparative Law Quarterly 795 at 799.

[433] P.B. Carter, *supra* note 393 at 2.

[434] Duncan Miller, "Public Policy in International Commercial Arbitrations in Australia" (1993) 9 Arbitration International 167 at 172.

Thus, Dr. Albert van den Berg, while defending the allegation that courts blindly pay lip service to the limitation on public policy,[435] cautioned that:

> the interpretation of public policy is like the movement of a pendulum. It has moved from an earlier parochialism to the present attitude in favour of international commercial arbitration. It may reach a point where international commercial arbitration be favoured too much by overly narrow interpretation of public policy, and this may produce counter reaction.[436]

In other words, the commentator appreciated the current narrow interpretation of the public policy defence but was quick to point out that the trend may reverse to a situation where the public policy defence may begin to serve as a means to avoid the enforcement of arbitral awards. At this stage, the public policy defence will become "a very unruly horse and when once you get astride it you never know where it will carry you."[437] It is therefore important to counsel against subjective application of the public policy defence in order that it will not serve as a shield to protect a fugitive from justice who seeks to avoid enforcement of an award arising from its contractual liability.

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[435] Albert van den Berg, *supra* note 16 at 367, referring to Joel Junker, *supra* note 326 at 246, where he argues that if courts continue to give a broad interpretation of the public policy defence thereby denying any use of the defence, this might limit the use of arbitration especially in "high risk commercial" situations.

[436] Albert van den Berg, *ibid.*, at 368.

[437] *Richardson* v. *Mellish* (1824) 2 Bing 228 at 252.

Chapter 5

Observations and Recommendations

5.0. INTRODUCTION

As noted in Chapter 4 of this study, Article V(1) of the 1958 New York Convention[1] lists five grounds which the party opposing the enforcement of an award has to establish in order to challenge the recognition and enforcement of the award successfully. The defences against the enforcement of an award contained in Article V(1) of the Convention and replicated in Article 36(1)(a) of the 1985 UNCITRAL Model Law[2] are based mainly on preliminary issues and non-compliance of the arbitral proceedings with procedural requirements.

Thus, by virtue of Article V(1) of the Convention and Article 36(1)(a) of the Model Law, the losing party to an arbitration may resist the enforcement of an award if the arbitral tribunal failed to comply with any agreed arbitral process. The procedural matters address whether: the parties consented to arbitration through a valid arbitration agreement, the parties have had ample opportunity to present their case before the tribunal, the appointment and composition of the arbitral tribunal are in accordance with the agreement of the parties and the tribunal limited their jurisdiction in accord with the scope of the parties' submissions. Contravention of any of these requirements suffice as grounds to attack the award at the

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[1] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. E/CONF. 26/9/Rev. 1, reprinted in 330 United Nations Treaty Series 38.

[2] *The UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17 (1985), reprinted in (1985) 24 I.L.M. 1302.

enforcement stage.[3]

But, as will be shown in this chapter, the Model Law contains adequate provisions which require the parties to challenge the breach of any of these procedural requirements during the course of the arbitration proceedings. However, unlike the Model Law, the New York Convention does not contain rules and substantive laws to guide the conduct of arbitration proceedings. Also, the Convention does not provide any restraint whatsoever on the control of the arbitral process by local courts at the place of arbitration.[4] Thus, under the Convention, the parties' right to request judicial review of the arbitral process is left to the provisions of national arbitration laws of the country or countries in which the award is sought to be enforced.

In the course of drafting the Model Law, it was recognised that this was unsatisfactory i.e., that national laws on arbitration were generally inadequate for the resolution of international disputes.[5] Also, at the time the Model Law was being drafted, there had been legislative improvements in some countries,[6] a positive change of judicial attitude toward

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[3] See generally the New York Convention, *supra* note 1, Articles V(1)(a) to (d) and the Model Law, *supra* note 2, Article 36(1)(i) to (iv).

[4] Laurence W. Craig, "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration" (1995) 30 Texas International Law Journal 1 at 11.

[5] *Ibid.*, at 25, where he noted that "many of the national arbitration laws were outdated and explicitly or implicitly submitted arbitration to procedures better-suited for court litigation."

[6] Reference is made to national arbitration law reforms which preceded the Model Law. Such laws include the English Arbitration Act of 1979, c.42 and the modification of the French *Code de Procedure Civile* (N.C.P.C.) in 1980, followed by a special chapter for international arbitration added by Decree No. 80-345 in 1981.

international commercial arbitration[7] and generally accepted international commercial arbitration principles[8] that had improved arbitration beyond the provisions of the Convention. The Model Law was therefore aimed toward incorporating these developments. Thus, the Model Law contains comprehensive provisions on substantive and procedural rules governing arbitration that reflect the demands of the users of international commercial arbitration.[9]

The substantive provisions of the Model Law regulating arbitration procedures guarantee expeditious resolution of disputes and, as has been noted, the Model Law has reduced "judicial intervention in the arbitral process, placing the courts in a supportive role and permitting them to act only in circumstances specified in the Law."[10] However, notwithstanding that the Model Law categorically defines the extent of judicial review of the arbitral procedure, it adopted the provisions of Article V(1) of the Convention on the extent of post-award judicial review based on scrutiny of the arbitration procedure.

By adopting the procedural grounds for the challenge of arbitral awards contained in Article V(1) of the New York Convention, the Model Law compromised its objective of speedy determination of the arbitral process. Thus, although the Model Law was aimed toward improving on the Convention with respect to expediting the enforcement of foreign

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[7] The courts of most countries have shown their disposition to allow arbitration of previously non-arbitrable subject matters and to compel unwilling parties to arbitration. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

[8] For example the acceptance and application of the twin principles of party autonomy and independence of the arbitral tribunal.

[9] Okezie Chukwumerije, "Reform and Consolidation of English Arbitration Law" (1997) 8 American Review of International Arbitration 21 at 22.

[10] Linda C. Reif, "Recent Developments in International Economic & Business Law" (1991) 2 (Papers presented at Mid-Winter Meeting of the Canadian Bar Association, Alberta Branch) 805 at 855 - 856.

arbitral awards with a minimum of judicial interference, there remains room for improvement.[11]

For instance, despite the limited grounds for challenging the enforcement of an award and the exceedingly narrow interpretations of those grounds by the courts, thereby making a challenge rarely successful, parties disgruntled with an award nevertheless still continue to challenge a final award and require the opposing party to defend the award in court. This attitude often results in a protracted litigation whereby the successful party, instead of realising the benefit of the award, is made to defend the award against claims that are without merit in most cases.[12]

However, there is no doubt that the parties have gained control of the arbitral process through the principles of party autonomy and the recognition of the independence of the arbitral tribunal. Thus, if the parties have agreed to submit to binding arbitration under the rules and substantive laws accepted by them, post-arbitration litigation is not only inconsistent with the principle of party autonomy but is also offensive to arbitration's goals of speed, efficiency and cost containment.[13]

In this chapter, I will argue that the substantive provisions of the Model Law on arbitration procedure (which are a compendium of international commercial arbitration

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[11] Dana H. Freyer & Hamid G. Gharavi, "Finality and Enforceability of Foreign Arbitral Awards: From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity" (1998) 13 ICSID Review - Foreign Investment Law Journal 101 at 103.

[12] William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., "Shifting Attorney's Fees in Litigation Attacking Commercial Arbitration Awards: A Disincentive for Meritless Motions for Correction, Modification or Vacatur" (1998) 35 American Business Law Journal 515 at 518 (hereinafter Daughtrey & Kidd).

[13] *Ibid.*

practice) and domestic court decisions based on the Convention and the Model Law do not support, and are inconsistent with, post-award attacks on grounds of procedural non-conformity. I will also proffer suggestions for reducing post-award attacks generally.

5.1. *Elimination of Procedural Grounds of Post-Award Attack*

> While arbitration is not a perfect procedure for dispute resolution and may require some judicial review, parties' abuse of court review cannot continue if the use of commercial arbitration is to increase. If arbitration is to provide a final determination of claims rather than a prelude to extended litigation, then [there] ... must exist [some procedure] to discourage disgruntled parties from challenging proper and final arbitration awards.[14]

As discussed in Chapter 4, under Article V(1)(a) to (d) of the Convention and Articles 34(2)(a)(i) to (iv) and 36(1)(a)(i) to (iv) of the Model Law, the losing party may attack the arbitral award by challenging the enforcement of the award or by an application for setting aside the award. The grounds included in these provisions are issues which are best considered and disposed of prior to, or during the arbitration process rather than being raised after an award is made.

5.1.i. *Determining the Validity and the Scope of the Arbitration Agreement*

Article V(1)(a) of the Convention and Article 36(1)(a)(i) of the Model Law provide that the incapacity of the parties to conclude the arbitration agreement or the invalidity of the agreement is a basis for challenging the enforcement of the award. Also, Article V(1)(c) of the Convention and Article 36(1)(a)(iii) of the Model Law state that an award exceeding the terms of the arbitration agreement or falling entirely outside the boundaries of the agreement

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[14] Daughtrey & Kidd, *supra* note 12 at 518.

may be invoked to resist the enforcement of an award.

The validity of the arbitration agreement is therefore crucial to an arbitration proceeding because it provides evidence of the parties' consent to arbitration and determines the extent of the arbitral tribunal's authority. Thus, it is essential that the validity of the arbitration agreement is fully determined before commencement of arbitration. In practice, as demonstrated by the cases considered in Chapter 4 of this study, challenges to the validity of the arbitration agreement and the extent of submission to arbitration are usually raised at the beginning of the arbitral process.

Also, consideration of the validity of the arbitration agreement and the jurisdiction of the arbitral tribunal as preliminary matters is in conformity with the Model Law. Article 16(1) of the Model Law recognises the competence of the arbitral tribunal to rule on its jurisdiction and to decide on the validity of the arbitration agreement. Article 16(2) of the Model Law expressly provides that a party (the defendant) intending to challenge the validity of the agreement must raise such objection not later than the submission of its statement of defence to the arbitration tribunal. Similarly, if any of the parties is of the opinion that the tribunal lacks jurisdiction or at any point in the proceedings feels that the tribunal is exceeding the scope of its authority, the party is obliged to raise its objections to the tribunal as soon as the matter alleged to be beyond the scope of the tribunal's authority is raised during the arbitral proceedings.[15]

If the arbitral tribunal makes a ruling on any of the above grounds, i.e. concerning the validity of the arbitration agreement or the scope of the tribunal's jurisdiction, the opposing

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[15] Model Law, *supra* note 2, Article 16(2).

party, if dissatisfied with the decision of the arbitral tribunal, shall within thirty days after having received notice of that decision, make a request for judicial review of the decision of the arbitral tribunal to the appropriate court.[16] Article 16(3) of the Model Law clearly states that the decision of the court concerning any matter referred to it under Article 16 "shall be subject to no appeal."

The effect of failure to raise objection to the lack or excess of the tribunal's jurisdiction under Article 16(2) was considered by the UNCITRAL Commission. The Working Group's fifth report states that:

> a party who fail[s] to raise the plea as required under Article 16(2) should be precluded from raising such objections not only during later stages of the arbitral proceedings but also in other contexts, in particular, in setting aside proceedings or enforcement proceedings, subject to certain limits such as public policy, including arbitrability.[17]

The party who fails to act in a timely manner cannot rely exclusively on the public policy and non-arbitrability exceptions because these defences have not been very successful, as shown in the cases considered in this study. Besides, even though the parties have been able to raise the public policy and arbitrability defences, it should be noted that Article V(2)(a-b) of the New York Convention and Article 36(1)(b)(i) & (ii) of the Model Law provide that the defences can only be raised by the courts.[18]

The provisions of Article 16 of the Model Law have received judicial support. The

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[16] Model Law, *supra* note 2, Article 16(3).

[17] *UNCITRAL Fifth Working Group Report*, A/CN.9/246, para. 51 (March 6, 1984).

[18] See Paolo Contini, "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1959) 8 American Journal of Comparative Law 283 at 304, Pieter Sanders, "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1959) 6 Netherlands International Law Review 43 at 56.

courts have emphasised that it is imperative that the parties must exercise their right to raise any of the above grounds strictly as provided for in Article 16 of the Model Law. Thus, in the Canadian case of *Kanto Yakin* v. *Can-Eng Manufacturing Ltd.*,[19] the respondent challenged the enforcement of the award on the ground that there was a fundamental breach of the licensing agreement, arguing that as a consequence the dispute was not capable of settlement by arbitration. The court held that:

> this issue should have been raised in a timely manner before the arbitration tribunal. Article 16 sets out the procedure for pleading that the arbitration tribunal lacked jurisdiction to hear the matter. The respondent did not avail itself of this opportunity to argue that the tribunal could not decide the matter brought before it. There is no evidence before this court to indicate that the respondent did anything other than ignore the arbitration proceedings until the instant application was brought before this court. The respondent is precluded from applying to have the award set aside by the court ...[20]

In *Dunhill Personnel Systems Inc.* v. *Dunhill Temps Edmonton Ltd.*,[21] the Alberta Court of Queen's Bench, having observed that the Model Law contains provisions enabling a party to promptly challenge the tribunal's jurisdiction during the course of the arbitral proceedings, stated as follows:

> given that the franchisee failed to do so, the tribunal's jurisdiction was no longer open to challenge. The court was obliged to hold the parties to the forum and arbitration which they had chosen.[22]

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[19] (1992) 7 O.R. (3d) 779 (Ont. Ct. Gen. Div.).

[20] *Ibid.*, at 791.

[21] (1994) 13 Alta. L. R. (3d) 241 (Alta. Ct. Queen's Bench).

[22] *Ibid.*

Also, in the U.S. case of *Overseas Cosmos, Inc.* v. *NR Vessel Corp.*,[23] decided under the 1958 New York Convention, the court stated as follows:

> As an initial matter, the Court notes that respondent had ample opportunity to raise its objection to arbitration on the ground that the agreement to arbitrate is unenforceable prior to and during the London arbitration proceeding. It chose not to do so, however. Thus, the Court finds that this ground for dismissal of the petition to confirm is not properly raised at this time and therefore has been waived.[24]

In the recent U.S. case of *Europcar Italia, S.p.A.* v. *Maiellano Tours, Inc.*,[25] the respondent challenged the enforcement of the award on the ground of fraud, alleging that the arbitrator's decision was based on a 1979 agreement that contained a forged Maiellano signature. The court stated that "the issue of whether the underlying [agreement] that is the subject of the arbitrated dispute was forged or fraudulently induced [is] a matter to be determined exclusively by the arbitrators."[26] The court noted that the requirement for prompt challenge of procedural irregularities is now "a rule of law"[27] and held that "if Maiellano failed to raise the issue of the forged 1979 agreement to the arbitrators, the issue is forfeited."[28] Furthermore, the court held that "if Maiellano did raise the issue to the arbitrators, it cannot

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[23] 1997 West Law 757041 (S.D.N.Y. Dec. 8, 1997).

[24] *Ibid.*, at 3.

[25] 156 F. 3d 310 (2nd Cir. 1998).

[26] *Ibid.*, at 315. See also *Riley* v. *Kingsley Underwriting Agencies Ltd.*, 969 F. 2d 953, 960 (10th Cir. 1992); *Meadows Indem. Co.* v. *Baccala & Shoop Ins. Services Inc.*, 760 F. Supp. 1036, 1041 (E.D.N.Y. 1991).

[27] *Ibid.*

[28] *Ibid.* Also, see *National Wrecking Co.* v. *International Bhd. of Teamsters, Local 731*, 990 F. 2d 957, 960 (7th Cir. 1993) where the court held that issues not raised before the arbitrator are waived in enforcement proceeding.

seek to re-litigate the matter here."[29]

Where a party to an arbitration agreement declines to submit to arbitration and instead commences litigation, the other party may request the appropriate court to compel the recalcitrant party to go to arbitration. On such application, the court shall necessarily rule decisively on the validity of the arbitration agreement under Article II of the Convention and Article 8 of the Model Law. If the court is of the view that the arbitration agreement is valid, it will order the parties to arbitration. But if the court finds that the agreement is null and void, inoperative or incapable of being performed, it will refuse to order the parties to arbitration.[30]

Thus, in either event, i.e., where the parties voluntarily submit to arbitration or where the court compels arbitration, the validity of the arbitration agreement and, inevitably, the capacity of the parties to conclude the arbitration agreement should have been resolved as a preliminary issue before the conclusion of the arbitral process. Also, as stated in Article 16 of the Model Law and supported by the court decisions above, the parties have been provided with an opportunity to raise objections promptly concerning the arbitral tribunal's lack of jurisdiction or excess jurisdiction.

Therefore, it is argued that it is inappropriate to retain these grounds in Article V(1)(a) & (c) of the Convention and Article 36(1)(a)(i) & (iii) of the Model Law as the bases for post-award challenge. It is in the interest of the parties to resolve the validity of the

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[29] *Europcar Italia, S.p.A., supra* note 25 at 315. Also see *Barbier* v. *Shearson Lehman Hutton Inc.*, 948 F.2d 117, 120-21 (2d Cir. 1991); *Fotochrome Inc.* v. *Copal Company Limited*, 517 F. 2d 512, 517-18 (2nd Cir. 1975); *Halley Optical* v. *Jagar Intern. Marketing*, 752 F. Supp. 638, 640 (S.D.N.Y. 1990).

[30] New York Convention, *supra* note 1, Article II(3); Model Law, *supra* note 2, Article 8(1).

agreement and the jurisdiction of the arbitral tribunal before the conclusion of arbitration. If the agreement is found to be invalid or the tribunal is without jurisdiction, the arbitration proceeding will be terminated thereby saving the parties the expenses of going through with the arbitration since the award will be invalid.

5.1.ii. *Composition of the Arbitral Tribunal*

Article V(1)(d) of the Convention and Article 36(1)(a)(iv) of the Model Law provide that a party may resist an award if the composition of the arbitral tribunal is not in accordance with the agreement of the parties. Again, this is incontestably a preliminary issue the consideration of which should not be delayed until after an award has been made. The parties usually agree on the appointment and composition of the arbitral tribunal and, where their arbitration agreement is silent on this, the Model Law and the arbitration rules of most institutionalised arbitral bodies provide a fall-back provision.

However, if for any reason there is a disagreement on the composition and appointment of arbitrators, Article 13(2) of the Model Law clearly states that a party intending to challenge the composition of the arbitral panel shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal, raise such objection before the arbitral tribunal.[31] If the arbitral tribunal decision is not favourable, the opposing party has thirty days from the date it received notice of the decision rejecting its objection to make a

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[31] See Article 8(1), *International Chamber of Commerce New Rules of Conciliation and Arbitration* (1989) 28 I.L.M. 231 (as amended and effective from January 1, 1998 <http://www.iccwbo.org>) which provides that any party intending to challenge the appointment of an arbitrator must do so within 15 days of such appointment or within 15 days after the occurrence of the circumstance on which the challenge is based. See also, Article 11(2) of the *International Arbitration Rules of American Arbitration Association*, as amended and effective on April 1, 1997 [<http://www.adr.org>] which provides that the challenge must commence within 30 days.

request to the appropriate court at the place of arbitration to decide on the matter. In addition, Article 13(3) of the Model Law provides that a decision of the court on the composition of the arbitral tribunal shall not be subject to appeal.[32]

Thus, Articles 11 and 13 of the Model Law expressly require the parties to an arbitration agreement to raise objections regarding the appointment and composition of the arbitral tribunal promptly and, where necessary, request the court at the place of arbitration to rule decisively on the matter during the arbitral proceedings.

Although the Commission did not adopt a written proposal that would have explicitly prevented a party from raising objections to the appointment and composition of the arbitral tribunal at subsequent court proceedings, it has been suggested that this result is clearly implied in Articles 12 and 13 of the Model Law.[33] This is the same ground contained in both Article V(1)(d) of the Convention and Article 36(1)(a)(iv) of the Model Law as one basis for challenging the recognition of arbitral awards at the place where enforcement is sought. Thus, the retention of Article V(1)(d) of the Convention and Article 36(1)(a)(iv) of the Model Law duplicate Articles 11 and 13 of the Model Law which oblige the parties to raise objections concerning the composition and appointment of the arbitral tribunal immediately and to regard the decision of the panel or a judicial review on the matter as final and not appealable.

There has not been any Canadian court decision directly on this explicit provision of

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[32] See also Article 11(5) of the Model Law, *supra* note 2, which provides that where an objection to the appointment of an arbitrator has been submitted to the court at the place of arbitration, such decision shall not be subjected to appeal.

[33] Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Deventer: Kluwer and Taxation Publishers, 1989) at 408.

the Model Law. It is however gratifying to note that in the U.S. where the Model Law has not been implemented at the federal level, the U.S. courts have repeatedly held unequivocally in favour of prompt challenge of an arbitral tribunal's irregularity. In *Hunt* v. *Mobil Oil Corp.*,[34] where the defendants sought to resist the enforcement of the award because of alleged partiality or misconduct of the arbitrators, Judge Weinfeld observed:

> if this [objection] were upheld, it would mean seven years of arbitral activities of the parties, of their lawyers and the huge legal expenses incurred would go down the drain ... [a party cannot] wait in ambush and then render wasteful years of effort at an expenditure of millions of dollars. A party "cannot remain silent, raising no objection during the arbitration proceeding, and when an award adverse to him has been handed down complain of the situation of which he had knowledge from the first."[35]

Similarly, in *La Societe Nationale pour La Recherche (Sonatrach)* v. *Shaheen Natural Resources*,[36] Judge Duffy rejected asserted "procedural deficiencies" in an ICC arbitration as defences to the enforcement of a foreign arbitral award and stated that a party resisting enforcement of an award:

> should have presented its objection to the arbitration panel. ... to deny recognition and enforcement to the arbitration award ... at this stage would be to violate the goal and the purpose of the Convention, that is, the summary procedure to expedite the recognition and enforcement of arbitration awards.[37]

The court therefore held that the respondent waived objection to confirmation of the award on the ground that it was not bound by the arbitration provision because such objection

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[34] 654 F. Supp. 1487 (S.D.N.Y. 1987).

[35] *Ibid.*, at 1518. See also *Cook Indus.* v. *Itoh & Co.*, 449 F.2d 106 (2nd Cir. 1971).

[36] 585 F. SUPP. 57 (S.D.N.Y. 1983), affirmed, 733 F. 2d 260, certified 469 U.S. 883 (1984).

[37] *Ibid.*, at 65. See also *Imperial Ethiopian Govt.* v. *Baruch-Foster Corp.*, 535 F. 2d 334, 335 (5th Cir. 1976); *International Standard Elect. Corp.* v. *Bridas Sociedad Anonima*, 745 F. Supp. 172 at 180 (S.D.N.Y. 1990).

was not raised before the arbitration panel.[38]

In the recent case of *Aaot Foreign Economic Association (VO) Technostroyexport* v. *International Development & Trade Services, Inc.*,[39] the respondent alleged that its agent, on her own initiative and to test the integrity of the arbitrators, asked the secretary of the panel whether the arbitrators could be "bought", to which the secretary responded affirmatively and offered to "fix" the cases in favour of the respondent in exchange for a substantial payment.[40] No agreement was reached between the respondent's agent and the secretary of the tribunal. The respondent participated actively in the arbitration hearings which ended in favour of the applicant.

In this action, the court was asked to decide whether to confirm an award rendered by an allegedly corrupt tribunal where the losing party, knowing the relevant facts, chose to participate fully in the proceedings without disclosing those facts until after the adverse award had been rendered. The court stated as follows:

> The settled law of this circuit precludes attacks on the qualifications of arbitrators on grounds previously known but not raised until after an award has been rendered. Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. *His silence constitutes a waiver of the objection.*[41]

The pronouncements of the U.S. courts in the above cases clearly highlight the principle that delay in raising objections to the arbitral tribunal for any procedural irregularity

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[38] *Sonatrach, ibid.*, affirmed, 733 F. 2d 260 (2nd Cir. 1984), cert., denied, 469 U.S. 883 (1984).

[39] 139 F. 3d 980 (2nd Cir. 1998).

[40] *Ibid.*, at 981.

[41] *Ibid.*, at 982 (emphasis added).

cannot defeat the enforcement of the arbitral award. The U.S. courts have held that delay in rasing procedural noncompliance means that the indolent party has waived its right to raise such irregularity at the post-award stage. Thus, the U.S. courts' interpretion of the Convention supports the Model Law statutory position that the appropriate time and place to initiate an objection of procedural irregularities is during the arbitral proceedings.[42] I have no doubt that the Canadian courts will find these cases persuasive, especially because the Model Law is the basis of arbitration proceedings held in Canada. Where a party is aware of a non-compliance with the rules governing an arbitration but decides to keep the point up its sleeve for later use, the court should not encourage such dilatory attitude.

In fact, Article 4 of the Model Law cleared away any ambiguity concerning the requirement for prompt challenge of preliminary or procedural non-compliance and its implication. Article 4 of the Model Law emphatically states that:

> A party who knows that any provision of this law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance *without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.*[43]

It is clear from the above provision that the Model Law not only provides for timely objection, it also expressly states that failure to object accordingly shall be considered as a waiver. In addition, the provisions of Article 4 of the Model Law are of general application covering all allegations of non-compliance including lack of adequate notice of the arbitral

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[42] This interpretation is hardly surprising considering that the Model Law is a reflection of the accepted practice in international commercial arbitration.

[43] Model Law, *supra* note 2, Article 4 (emphasis added). See also Article 25, *AAA Arbitration Rules*, *supra* note 31, Article 33, *ICC Arbitration Rules*, *supra* note 31.

process or inability of any of the parties to present their case as provided in Article V(1)(b) of the Convention and Article 36(1)(a)(ii) of the Model Law.

A party alleging that any of these procedural issues was violated or is being violated should immediately raise proper objections during the course of the arbitral proceedings. Article 4 of the Model Law unambiguously states that a party that has failed to raise objection of an alleged procedural non-compliance promptly is precluded from raising that objection at a later stage, for example, at the enforcement of the award in foreign state or as a ground for setting aside the award in the place where the award was made.

The Model Law *travaux preparatoires* made it abundantly clear that Article 4 provides for implied waiver of the right to object to any noncompliance with certain procedural requirements if an objection is not made "without undue delay".[44] Thus, if the party has failed to raise the objection in a timely manner, it loses any right to raise such defence at a future date. On the other hand, if the party raised the objection within the stated time limit and a decision of the arbitral tribunal was submitted for a judicial review, the court decision on the matter is final.[45] Wherein lies the right of the party to invoke procedural irregularity as a ground to attack the award at the post-award stage?

It has been observed that Article 4 of the Model Law is based on a general principle known in various legal systems as waiver or estoppel.[46] In adopting Article 4, the UNCITRAL Commission was of the view that it is useful to help the arbitral process function

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[44] See *UNCITRAL Analytical Commentary on Draft Text: Seventh Secretariat Note*, A/CN.9/264 (March 25, 1985).

[45] See Model Law, *supra* note 2, Articles 11, 13 and 16.

[46] Howard M. Holtzmann and Joseph E. Neuhaus, *supra* 33 at 196.

efficiently and in good faith.[47] Therefore, there is no doubt that the objective of the Model Law is to effectively exclude objections on preliminary matters or procedural irregularities after the arbitral process has ended. Curiously, the Model Law repeated the procedural issues in Articles 36(1)(a)(i-iv) and 34(2)(a)(i-iv) as grounds which may be invoked after the award has been made to attack the enforcement of the award. By implication, the Model Law, to the extent of this duplication, is contradictory.

The UNCITRAL Commission noted that Articles 4 and 16 have the effect of preventing a party from raising procedural noncompliance at a proceeding to set aside or enforce the award, but failed to address the inherent contradiction between Articles 4 & 16 and Articles 34 & 36. The Commission was inclined to retain Article V of the New York Convention because the UNCITRAL Secretariat report of judicial decisions applying the Convention up to 1979, indicated that the Convention had been particularly successful, giving rise to few problems.[48] The Commission therefore resolved to adopt Article V in its entirety into the Model Law without specifically addressing its consistency with the other parts of the Model Law.

Although the Model Law is the only instrument explicitly addressing the need for prompt challenge of procedural noncompliance and that such delay should be treated as a waiver, the U.S. cases mentioned above which were decided under the Convention indicate that absence of the Model Law in a Convention state cannot avail the party that failed to act promptly. The courts have adopted a favourable policy towards arbitration, tacitly

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[47] *UNCITRAL Analytical Commentary*, *supra* note 44.

[48] See *UNCITRAL Summary Record*, A/CN.9/SR.220, para. 17.

acknowledging the independence of the arbitral tribunal by reposing considerable confidence in the ability of arbitration panels to deal with procedural matters. Thus, U.S. courts, like their counterparts in the "Model Law States" such as Canada, have insisted on strict compliance with prompt challenge of procedural non-conformity. Therefore, the courts are reluctant to deny the enforcement of an award where the opposing party has not acted promptly in rasing objection to any alleged procedural non-compliance.

While it may be argued that the U.S. courts' decisions represent an isolated case considering that there are about 120 other countries that follow the Convention,[49] it should however be noted that enforcement of an arbitral award is sought where the losing party has assets. The U.S. courts control a fair share of international commercial arbitration cases due to the huge concentration of assets belonging to its nationals and nationals from other countries. Therefore, the attitude of U.S. courts to the enforcement of arbitral awards should serve as a pointer to the likely conduct of other international arbitration centres.[50]

Also, parties now insist on appointing persons who are legally trained to serve as arbitrators. Some of the arbitration agreements now provide that the arbitrators shall be retired judges or law professors. The parties are also likely to be represented by lawyers at the arbitration proceeding.

In addition, using the UNCITRAL Notes on Organising Arbitral Procedures which provides a checklist to remind parties and arbitrators of procedural matters that are useful to

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[49] It is also important to note that the study is confined to the practice in U.S. and Canadian courts, thus it should not be ruled out that other countries may have adopted such favourable interpretation of the Convention.

[50] Countries such as England and France which are major arbitration centres are generally in favour of liberal enforcement of international commercial arbitration.

consider early in the proceedings will also reduce the chances of procedural irregularity.[51] Also, major arbitration institutions such as the ICC, LCIA, AAA, the Stockholm Chamber of Commerce and the UNCITRAL Arbitration Rules provide a sophiscated and well developed arbitration rules which offer a guide on which the parties can rely for the settlement of their international commercial disputes.[52]

It is instructive to note that the Iran-US Claims Tribunal and the quasi arbitration organised by the Hague and the United Nations Compensation Commission (UNCC) referred to the UNCITRAL Arbitration Rules for guidance. These bodies have been largely successful in handling politically sensitive international disputes involving huge amounts beyond any former arbitration dispute in history.[53]

Thus, the likelihood of the arbitral tribunal violating procedural rules or the parties legal representatives unconsciously ignoring such breach is very minimal. The quality of arbitral awards can now be ensured without subjecting the procedure to post-award attack.

Therefore, I hold the view that Article V(1)(a-d) of the Convention and Articles 34(2)(a)(i-iv) and 36(1)(a)(i-iv) of the Model Law have been rendered otiose by Articles 4, 11, 13 & 16 of the Model Law and the decisions of the courts highlighted above. These provisions are not necessary under the present pro-enforcement bias of international arbitral

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[51] See the *Report of the UNCITRAL Twenty-ninth Session*, U.N. Supplement No. 17 (A/51/17), paras. 11-54. See H. M. Holtzmann, "Introduction to the UNCITRAL Notes on Organizing Arbitral Proceedings" (1997) 5 Tulane Journal of International and Comparative Law 408, H. M. Holtzmann, "Centripetal and Centrifugal Forces in Modern Arbitration" (1999) 65 Journal of the Chartered Institute of Arbitrators 302 at 303-304.

[52] K. H. Bockstiegel, "Some Major Changes in International Arbitration: The Past, The Perspective" (1999) 65 Journal of the Chartered Institute of Arbitrators 244 at 247.

[53] *Ibid.*

awards in the U.S. and Canada. However, the courts cannot refuse or ignore the application of these provisions without an amendment or revision of the relevant instruments. As this has not yet occured, the only effect of these provisions is to provide opposing parties the basis to delay the enforcement of arbitral awards. It is therefore my considered opinion that these provisions should no longer be applied as grounds to justify a post-award challenge.

5.1.iii. ***Legislating Against Post-Award Litigation Based On Procedural Noncompliance***

Based on the above observations, I am of the opinion that the 1958 New York Convention and the Model Law need some updating. I recognise that several authors have expressed the view that it is preferable not to tinker with the 1958 New York Convention because of the advantages already obtained through the Convention, the difficulty involved in a revision process and, the time it might take for all the contracting states to ratify the new provisions and also to obtain a uniform interpretation of it by courts of various legal systems.[54] Whilst I am sensitive to this sentiment, I am however of the view that the spate of post-award attacks which has lead to the increased cost of arbitration and delay justifies this action. Unfortunately, the possibility of amending the Convention appears very remote at present.

However, since states are free to depart from the Model Law when adopting national

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[54] See, Albert van den Berg, *The New York Arbitration Convention 1958* (Deventer: Kluwer Law and Taxation Publishers, 1981), Albert van den Berg; "The New York Convention: Its Effects, Its Interpretation, Salient Problem Areas" (1996) No. 9 ASA Special Series 20; Albert van den Berg, "Enforcement of Annulled Awards" (1998) 9 ICC International Court of Arbitration Bulletin 15; Neil Kplan QC, "Is the Need for Writing as Expressed in the New York Convention and the Model Law out of Step with Commercial Practice? (1996) 12 Arbitration International 27 at 45 (although he acknowledged the difficulties, he however suggested some changes to the Convention).

arbitration laws,[55] it is suggested that the states that have yet to adopt or revise their national arbitration law should take into account these observations. For states that have recently adopted national arbitration laws, they should also consider its revision since it is relatively easier to amend domestic legislation.

5.2. *Creation of Arbitral Appeals Tribunal*

In order to prevent delay in the enforcement of an award as a result of post-award litigation, and to avoid unnecessary judicial review of the arbitral process and award, this study further recommends the creation of institutional arbitral appeal tribunals. Institutionalised arbitral bodies such as the American Arbitration Association (AAA), the International Chamber of Commerce (ICC), the Canadian Arbitration and Amicable Composition Centre, Ottawa etc. should establish arbitral appeal tribunals by amending their institutional arbitration rules. An institutional appeal tribunal should serve as an appellate body with jurisdiction to review arbitral awards on procedural issues. Parties who submit to an *ad hoc* arbitration may either refer an appeal against an arbitral award to the institutionalised appeal tribunal or constitute an *ad hoc* appeal arbitrator for this purpose.

The parties should undertake in their arbitration agreement that an award issued by the appeal tribunal will not be subjected to further procedural review by the courts where the award was made or where the award is sought to be enforced. It is necessary that the arbitration agreement state expressly the parties intention to adopt the institutionalised arbitral appeal tribunal for challenging the award. Also, arbitral institutions rules should include a

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[55] It is regrettable that the few states that have adopted national arbitration laws after the Model Law, retained both Articles 4, 11, 13, & 16 and Articles 34 & 36.

provision stating that by choosing their arbitral rules, the parties consent to the jurisdiction of the institution's appeal tribunal.

The call to institutionalise arbitral appeals has been proposed by Mauro Rubino-Sammartano.[56] However, he envisioned the creation of an International Arbitral Court of Appeal instituted under the auspices of an international convention. According to Rubino-Sammartano, such International Arbitral Court of Appeal should be entrusted with the appointment and supervision of appellate proceedings. He suggested that an award that has been confirmed by the International Court should be treated as final and not subject to attack in the courts of member states, and that the Court's awards should be self-executory, i.e., without need for recognition proceedings in the regular national courts and without any possible opposition to them.[57]

The proposal for an appeals tribunal was reiterated at the 1993 London Court of International Arbitration (LCIA) Centenary Conference by Judge Howard Holtzmann in his seminal address to the LCIA Conference,[58] and supported by Judge Stephen Schwebel of the International Court of Justice.[59] They called for the creation of an international appellate arbitral body which would have exclusive jurisdiction with respect to both enforcement and

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[56] Mauro Rubino-Sammartano, *International Arbitration Law* (Deventer: Kluwer Law and Taxation Publishers, 1990) at 508-509. He argued that there is no reason why the arbitrator's decision should not be reviewed by an appellate arbitration panel in place of a review of arbitral awards by the courts.

[57] *Ibid.*, at 511.

[58] See Howard Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards" in Martin Hunter, Arthur Marriott & V.V. Veeder, eds., *The Internationalization of International Arbitration* (London: Graham & Trotman/Martinus Nijhoff, 1995) 109.

[59] See Stephen Schwebel, "The Creation and Operation of an International Court of Arbitral Awards" in *The Internationalization of International Arbitration, ibid.*, at 115.

the setting aside of awards made under the Convention. They further contended that decisions rendered by this transnational body should, like awards rendered under the auspices of the International Centre for Settlement of Investment Disputes (ICSID),[60] be binding in the contracting states.

The proposal has also received support from a number of international arbitration practitioners. One commentator noted that:

> an international court of arbitral awards combining limited appellate powers on the application of public law by arbitrators with full and exclusive jurisdiction on setting aside awards and recognition and enforcement of awards under the New York Convention would be a major achievement.[61]

The creation of an international arbitration appeal body vested with the exclusive right to enforce arbitral awards is another way of achieving complete independence of the arbitral process and eliminating state control.

The practice of accepting arbitral appeals decisions as final and not appealable has also been adopted in some treaties providing for arbitration.[62] For example, the ICSID Convention does not permit judicial review of an award made under the Convention.[63] However, it has been observed that in some cases the losing party in an ICSID arbitration may not comply

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[60] *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (ICSID), 575 U.N.T.S. 160 (1966).

[61] Jacques Werner "The Trade Explosion and Some Likely Effects on International Arbitration" (1997) 14 Journal of International Arbitration 5 at 15.

[62] See the *ICSID Convention, supra* note 60, The *North American Free Trade Agreement*, Chapter 11, (1993) 32 I.L.M. 289; *Canada-Chile Free Trade Agreement*, Part Three, S.C. 1997, c.14.

[63] See *ICSID Convention, supra* note 60, Article 52. Appeals against ICSID awards are made to the ICSID *ad hoc* Committee. The award made by the ICSID arbitrators or the decision of the Committee on appeal is final and not appealable in ICSID member states. See generally, Articles 52(2), 53 & 54.

with the terms of the award.[64] Another commentator also criticised the first ICSID *ad hoc* Committee ruling.[65] However, he acknowledged that ICSID arbitration remains an example of an entirely internal and international mechanism that is self-contained.[66]

While I identify with the objective of an International Arbitral Court, it is however unrealistic to hope that such an international court can be established within the foreseeable future because states are not yet ready to accept a system of private international arbitration absolutely free from any form of state control. Thus, concluding a convention that will provide the legal framework for an international arbitral court may not be an easy task. It is for this reason that I propose the establishment of arbitral appeal tribunals by institutionalised arbitral bodies with jurisdiction to ensure that arbitral awards conform with procedural issues and thereby reduce the bases for post-award litigation.[67]

An arbitral appeal tribunal will afford the party insisting on challenging the arbitral award an in-house opportunity to have the award reviewed by an appeal tribunal. The

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[64] See S. Caras-Borjas, "Recognition and Enforcement of ICSID Awards: The Decision of the French Cour de Cassation in Soabi v. Senegal" (1991) 2 American Review of International Arbitration 354.

[65] See W. Michael Reisman, "The Breakdown of the Control Mechanism in ICSID Award" (1989) Duke Law Journal 739; W. Michael Reisman, "Repairing ICSID's Control System: Some Comments on Aron Broches' "Observations on the Finality of ICSID Awards" (1992) 7 ICSID Review - Foreign Investment Law Journal 196. The criticism was not a condemnation of the entire process but a caution on the constitutive ruling of the first ICSID *ad hoc* Committee in *Klockner I* which expanded the grounds of nullification of ICSID awards in Article 52(1) of the ICSID Convention. Subsequent ICSID *ad hoc* Committee have limited the appellate review in accordance with the provisions of Article 52(1). See *Amco I ad hoc* Committee Decision reprinted in (1986) 1 International Arbitration Report 649.

[66] W.M. Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Durham: Duke University Press, 1992) at 46.

[67] The International Court of Arbitration of the ICC scrutinises arbitral awards as to form and subsatnce as a part of the quality controls measures of the ICC. Although this exercise is not legally binding on the arbitrators, but due to the moral authority of the ICC Court, the ICC arbitrators are inclined to abide by its comments and change their decision on the merits pursuant to the court's recommendation. H. A. Grigera Naon, "The Role of International Commercial Arbitration" (1999) 65 Journal of the Chartered Institute of Arbitrators 266 at 273.

challenge of arbitral awards through appeal tribunals is in conformity with the essence of the parties' agreement to arbitrate their dispute, which is to avoid the courts.

Also, an arbitral appeals tribunal is more suited to review arbitral awards than the courts since arbitrators are not required to disclose the factual basis or reasoning behind their awards and, unless otherwise agreed to by the parties, a written transcript of the award is not required.[68] It stands to reason that where findings and conclusions of the arbitral panel are absent, the courts will be unable to carry out consistent or meaningful review. The courts will find it difficult to review, for example, whether the arbitrator refused to apply the applicable procedural law and rules.[69] In contrast, institutionalised appeal tribunals will have easier access to the trial arbitration records because the arbitral panel that tried the case will be more disposed to provide information to the appellate tribunal than the court which may not be within the same jurisdiction as the arbitral institution.

Business persons will find the use of the arbitral appeal tribunal as a means for challenging the awards rewarding as it saves time and costs compared to litigation. The parties are free to agree that the arbitral appeal tribunal shall serve as the only source of challenge open to the parties to attack the award.

On the other hand, post-award litigation may involve various levels of the national courts. This can occur because the New York Convention and the Model Law do not designate which court in the hierarchy of national courts should possess original jurisdiction

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[68] Jessica L. Gelander, "Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations" (1997) 80 Marquette Law Review 625 at 643.

[69] *Ibid.*

to address the issue of enforcing or setting aside an award. In view of this lacuna and, in conformity with the rules in most countries, the superior court of first instance is normally seised with original jurisdiction to decide on the enforcement of arbitral awards.[70] Also, the Convention and the Model Law do not limit the number of appeals against an award at the place where the award is sought to be enforced. Again, the practice in most countries is that the party challenging the arbitral award may maintain an appeal against the enforcement of the award up to the highest court of the state, unless its application for leave to appeal to the next court is denied at a particular stage.[71]

It has been noted that the omission to designate the court that has original jurisdiction to enforce arbitral awards and the failure to limit the number of appeals of an application to challenge an award is significant and has resulted in "consequential complications, delays and greatly increased costs."[72] If an award is challenged in the court, the petitioner may maintain the appeal up to the highest court at the place where the enforcement of the award is sought.[73] Thus, in pursuing a disputed award through the various levels of the courts where the award is sought to be enforced, considerable time and resources will be expended so that it might have been preferable if the parties had chosen at first to resolve their disputes through

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[70] Rene David, *Arbitration in International Trade* (Deventer: Kluwer Law & Taxation Publishers, 1985) at 382.

[71] In *Quintette Coal Limited* v. *Nippon Steel Corporation et al.* (1990) 50 B.C.L.R. (2d) (C.A.) 207 after the arbitrators had spent 142 days of hearings over 2 years, the petitioner challenged the award from the court of first instance up to the appeal court, before its application for leave to appeal to the Supreme Court of Canada was dismissed.

[72] Michael Kerr, "International Arbitration V. Litigation" (1980) Journal of Business Law 164 at 172.

[73] *Quintette Coal Limited, supra* note 71.

litigation instead of arbitration.[74] Thus, in order to avoid this from happening, the use of institutionalised arbitral appeal tribunal will prevent the delay associated with litigation.

At any event, challenging arbitral awards through the institutionalised arbitral appeal is in conformity with the parties' original agreement to arbitrate their disputes. After all, "absence of [judicial] appeal [is] ... one of the principal features of arbitration, ... in that it reduces costs and opportunity for delay..."[75]

Already, some states allow parties to international commercial agreements the right to adopt an "exclusion agreement" which abolishes any possibility of an appeal against international commercial awards made in accordance with the procedural law of that state.[76] For example, sections 67, 68 and 69 of the English Arbitration Act, 1996 which deal with challenges of, and appeals against awards, provides that no application or appeal shall maintain against arbitral awards unless the applicant has first exhausted any available arbitral process of appeal or review. Thus, it has been noted that the Act recognises "the use of internal arbitral review or appeal process ... [as] a measure aimed at minimizing recourse to courts."[77]

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[74] See *Quintette Coal Limited, supra* note 71. In *Dalmia* v. *National Bank of Pakistan*, (1978) 2 Lloyd's Report 223, the time from the outbreak of the dispute to its final resolution in the court was more than 11 years.

[75] Andreas F. Lowenfeld, *International Litigation and Arbitration* (Oxford: Clarendon Press, 1993) at 327-328.

[76] See Pierre Mayer, "The Trend Towards Delocalisation in the Last 100 Years" in Martin Hunter, Arthur Marriot & V.V. Veeder, eds., *The Internationalisation of International Arbitration* (London: Graham & Trotman Limited, 1993) 37 at 44-45 where he referred to the *England Arbitration Act*, 1979 (now Arbitration Act, 1996); *The Swiss Federal Act on Private International Law, 1987*; *The Draft New Swedish Act* (now the *Swedish Arbitration Act of 1999* [Sweden], SFS 1999:116); and the *Belgian Law*, 1985.

[77] Okezie Chukwumerije, "Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996 " (1999) 15 Arbitration International 171 at 177 (footnote 30).

Also, it has "become common for institutions that administer international commercial arbitrations to include provisions in their procedural rules expressly excluding national judicial review of arbitrations they administer."[78]

In addition, Canadian courts also recognise that the parties may agree to waive their right to challenge the award under Article V of the Convention or Article 36 of the Model Law. In *Food Services of America Inc.* v. *Pan Pacific Specialties Ltd.*,[79] the court upheld an arbitration agreement which stated as follows:

> The parties intend that any award entered by the arbitrators in this case be final and binding, subject to enforcement either in Canada and/or the United States. In this regard, both parties hereby expressly waive any entitlement they have or may have to rely upon the provisions of Section 36 of the International Commercial Arbitration Act of the British Columbia (SBC 1986 c.14) ... to seek to avoid recognition or enforcement of an arbitration award made pursuant to this Agreement.[80]

In refusing the respondent's petition challenging the enforcement of the award, the British Columbia Supreme Court held that the only possible interpretation of the agreement was that the parties had waived their right to oppose enforcement of the award under Article 36 of the Model Law. The court stated that the respondent's ground for opposing enforcement could not be supported as they clearly fell under the waiver.[81]

In the recent case of *Noble China Inc. et al.* v. *Lei*,[82] the parties stated in their

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[78] Philip J. McConnaughay, "The Risks and Virtues of Lawlessness: A " Second Look" at International Commercial Arbitration" (1999) 93 Northwestern University Law Review 453 at 467.

[79] (1997) 32 B.C.L.R. (3d) 225 (B.C.S.C.)

[80] *Ibid.*, at 228.

[81] *Ibid.*, at 229.

[82] (1999) 42 O.R. (3d) 69 (Ont. Ct. Gen. Div.).

arbitration agreement that "no matter which is to be arbitrated is to be the subject matter of any court proceeding other than a proceeding to enforce the arbitration award."[83] In an action to set aside the award under Article 34 of the Model Law, the court opined that excluding recourse to the courts to set aside an award is not contrary to any provision of the Model Law.[84] Thus, the court held that in this case the arbitration agreement was:

> ... a waiver of the right to bring an application to set aside the award. In my opinion, the court should give effect to this. This is consistent with the philosophy and structure of the Model Law, indeed with its "Magna Carta". The parties make their own agreements, so long as they do not derogate from its mandatory provisions. Article 34 is not such a provision.[85]

Although the U.S. courts have not considered the validity of an arbitration agreement wherein the parties agreed to exclude their right to challenge the award, given the pro-enforcement bias of the U.S. courts, it is plausible to argue that the courts will honour such an agreement when these cases arise in future.

Also, national arbitration laws of some countries no longer insist on judicial review of arbitral awards. The prevailing attitude is to eliminate or restrict the right to appeal, mostly in cases of international commercial arbitration. For example, Article 1717 of the *Belgian Code Judicature*[86] does not allow applications to annul international commercial awards made

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[83] *Noble China Inc.*, *supra* note 82 at 73.

[84] *Ibid.*, at 93.

[85] *Ibid.*

[86] See *Code Judicature* (Belgium) Law of March 27, 1985.

in Belgium.[87] Article 69(1) of the new England *Arbitration Act*[88] allows the parties to exclude appeals against arbitral awards rendered in international or domestic arbitration.[89]

One would expect that other countries considering amending their domestic arbitration laws will take into account the liberal approach adopted by England and Belgium.[90] The courts should also emulate the Canadian courts' enforcement of an arbitration agreement against an unwilling party which provides that the decision of an appeal tribunal is final and binding on the parties. The courts should also decline to entertain a petition challenging the enforcement of an award which has been reviewed by an arbitral appeals tribunal.

5.3. *Validity of Arbitral Awards Finalised at Place of Arbitration*

In the current situation where there are no arbitral appeal panels, and arbitral awards are challenged in the courts, it is my recommendation that the party seeking to resist the enforcement of the award should promptly challenge the award at the place where the award was made in order to determine finally the validity of the award. It is more appropriate for the losing party dissatisfied with the award to initiate the challenge proceedings in the country where it was made rather than idle by waiting to attack the award in other countries where enforcement is sought. The courts where the award was made are best situated to hear

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[87] See M. Storme, "Belgium: A Paradise for International Commercial Arbitration" (1986) 14 International Business Lawyer 294 at 296.

[88] (1997) 36 I.L.M. 155.

[89] Okezie Chukwumerije, *supra* note 9 at 44.

[90] See Gerold Herrmann, "Does the World Need Additional Uniform Legislation on Arbitration?" (1999) 15 Arbitration International 211. He noted that the London Court of International Arbitration administer a sizeable amount of international commercial arbitration. The new England Arbitration Act should therefore be seen as a reflection of the need to revolutionalise the practice of international arbitration.

appeals on the award because they "offer active and passive support of the arbitration proceedings."[91]

In addition, modern arbitration laws of some states now preclude judicial review of arbitral awards on grounds of procedural non-compliance if the arbitration proceedings were not held within the territory of the state.[92] For example, Article 1504 of the French Code[93] states clearly that French courts will not review an award that was rendered abroad. In other words, international arbitral awards should not be reviewed on grounds of procedural irregularities except at the place of arbitration or under the law by which the award was made.[94]

U.S. courts are also in favour of judicial review of arbitral awards in the foreign state where the award was made or under the law of which governs the making of the award. This has been attributed to the express incorporation of recognition provisions in the New York Convention. In the U.S. case *International Standard Electric Corp.* v. *Bridas Sociedad Anonima Petrolera, Industrial y Commercial,*[95] the court opined that the phrase in the New York Convention "[the country] under the laws of which that award was made" undoubtedly refers to the procedural law of arbitration. The court therefore concluded that judicial review

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[91] William W. Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration" (1989) 63 Tulane Law Review 647 at 650.

[92] See Philip J. McConnaughay, *supra* note 78 at 466-467. The commentator made references to Arbitration Laws of England, Belgium, Switzerland, France, Hong Kong, Singapore, China, and Malaysia. He also notes that United States practice places substantial limits on judicial review of international arbitrations.

[93] *Nouveau Code De Procedure Civile* [N.C.P.C.] (1981). See generally Articles 1494, 1501 - 1505.

[94] See Philip J. McConnaughay, *supra* note 78 at 467.

[95] 745 F. Supp. 172 (S.D.N.Y. 1990).

of the arbitral process should be conducted by the court whose law governs the arbitration procedure.[96]

In the Canadian case of *Europcar Italia S.p.A.* v. *Alba Tours International Inc.*,[97] the court was asked to refuse enforcement of the award on the ground that the arbitrator lost jurisdiction to make the award because he misinterpreted the renegotiation clause of the agreement. The court held that since the agreement was governed by Italian law, "it was the exclusive right of the Italian court to determine, according to Italian law, the question of whether the arbitrator lost jurisdiction. The court therefore adjourned the enforcement proceedings *sine die*, pending the determination of the appeal in the Italian court.[98]

The proposal to have arbitral awards challenged only at the place where the award was made is aimed at resolving any alleged procedural non-conformity which the opposing party may utilise as a ground to challenge the enforcement of the award. By vesting ultimate authority in the courts where the award was made, "an improper award can be eliminated at the source and the spectre of inconsistent judgments avoided."[99]

The approach supports the view that by choosing the place arbitration, a party not only agreed to submit the contractual disputes to arbitration but also agreed that the conduct of the arbitration should (in the absence of any reservation), be subject to the supervisory

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[96] *International Standard Electric Corp, supra* note 95 at 177-178.

[97] Unreported (Ont. Ct. Gen. Div.), [1997] Ontario Judgments No. 133.

[98] *Ibid.*, at para 5-6.

[99] Hamid G. Gharavi, "Chromalloy: Another View" (1997) 12 Mealey's International Arbitration Report 21 at 23.

jurisdiction of the courts of that place.[100]

A party intending to challenge the award should commence such action strictly in accordance with the provisions of Article 34(3) of the Model Law which allows a time limit of three months from the date of making the award or receipt of the award. Article 34(3) of the Model Law thus requires the opposing party to initiate the challenge procedure promptly in order to conclude the challenge of the award before the successful party may seek enforcement proceedings.

Under the U.S. *Federal Arbitration Act*,[101] if a party fails to move to vacate an arbitration award within the three months period allowed under the Act, the party forfeits the right to oppose enforcement of the award if sought later by the other party.[102] This provision has been upheld by several U.S. courts,[103] and should be extended to international commercial arbitration through the adoption of similar provisions in domestic arbitration laws.

This study further recommends that on application for setting aside the award, the courts should be obliged to give effect to the provisions of Article 34(4) of the Model Law which states that:

> The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity

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[100] Per Mr. Justice Colman in *Minmetals Germany GmbH* v. *Fercosteel Ltd.*, judgment of January 20, 1999 published in The Times, March 1, 1999 at 41.

[101] *FAA*, 9 U.S.C., section 1.

[102] *Ibid.*, section 12.

[103] See *Chauffeurs, Teamsters, Warehousemen & Helpers* v. *Jefferson Trucking Co.*, 628 F. 2d 1023, 1027 (7th Cir. 1980); *Taylor* v. *Nelson*, 788 F. 2d 220, 225 (4th Cir. 1986); *Florasynth* v. *Pickholz*, 750 F. 2d 171, 174-177 (2nd. Cir. 1984); *Lander Co., Inc.* v. *MMP Investments, Inc.*, 107 F. 3d 476, 478 (7th Cir. 1997).

to resume the arbitral proceedings or *take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside* (emphasis added).

It is thus recommended that the word "may" in Article 34(4) of the Model Law should be replaced with "shall" such that where the alleged ground(s) for challenging or setting aside the award is/are not fundamental and can be rectified, the courts shall (and not may) refer the parties "back" to arbitration so that the arbitral tribunal can eliminate the grounds of appeal. States enacting new arbitration laws and states that have adopted arbitration laws based on the Model Law should reflect this suggestion in their arbitration laws. This approach will save the award as well as the time and costs of starting the dispute *de novo*.[104] Indeed, this provision applies in some legal systems whereby superior courts, instead of reserving the lower court's decision on minor procedural noncompliance, would direct the parties to the lower court to enable the court purge itself of the irregularity.

In addition, if the court adopts the system of referring the awards to the arbitral tribunal for reconsideration, Article V(1)(e) of the Convention will no longer be invoked by the losing party as a ground to challenge the enforcement of the award.[105] Thus, this will effectively eliminate the current controversy regarding the effect of a set aside award under Article V(1)(e) of the Convention. The controversy was highlighted in Chapter 4 of this study with the case of *Chromalloy* and the French courts' consistent attitudes toward enforcing a set aside award as exemplified in the recent Supreme Court of France decision in *Omnium de*

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[104] Gerold Herrmann, "The UNCITRAL Model Law - Its Background, Salient Features and Purposes" (1985) 1 Arbitration International 6 at 24.

[105] New York Convention, *supra* note 1, Article V(I)(e) provides that the award may be challenged if "it has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." See also Article 36(1)(a)(v) of the Model Law, *supra* note 2.

Traitement et de Valorisation v. *Hilmarton.*[106]

The inconsistent treatment of a set aside award by contracting states to the Convention may prove one of the greatest obstacles to the recognition and enforcement of arbitral awards. As one commentator has noted, "[u]nless other legal systems respect that outcome, the consequence might be inconsistent decisions and vast confusion."[107]

5.4. *Limiting State Control of the Arbitral Process under the Non-arbitrability and Public Policy Defences*

The arbitral process cannot wholly extricate itself from state control. In fact, arbitration requires the co-operation and assistance of the state through the national courts. The arbitral tribunals may approach the courts for assistance in compelling the attendance of a witness or production of a document. The courts also assists arbitration by compelling an unwilling party to arbitration and in the enforcement of the award. Thus, since the courts are an apparatus of the state, it is wishful thinking to expect that the state will not exercise some control over the arbitral process.

With respect to the enforcement of arbitral awards, state control of the arbitral process is manifest in the non-arbitrability and public policy defences. Article V(2)(a-b) of the

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[106] 1997 Reveue de l'Arbitrage 376, translated in (1997) 22 Yearbook Commercial Arbitration 696. *Hilmarton* involved an arbitration conducted in Switzerland between a British and French company over certain consultation fees. The original arbitral proceeding went in favour of the French company (OTV). Hilmarton appealed to the Swiss court in Geneva, which annulled the award. The award was however enforced in France. The second award which went in favour of Hilmarton was also recognised and enforced in France before it was halted by the French Supreme Court. See Stephen T. Ostrowski & Yuval Shany, "Chromalloy: United States Law and International Arbitration at Crossroads" (1998) 73 New York University Law Review 1650 at 1673 -74.

[107] Jan Paulsson, "Rediscovering the New York Convention: Further Reflections on Chromalloy" (1997) 12 Mealey's International Arbitration Report 20 at 27-28.

Convention and Articles 36(1)(b)(i-ii) & 34(2)(b)(i-ii) of the Model Law empower the state, albeit through the courts, to *ex officio* refuse the enforcement of an award or set aside an award if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of the state or that the enforcement of the award would be contrary to the public policy of the state.

Although my recommendation for the elimination of the procedural grounds as bases for post-award attack does not affect the power of the court to *ex officio* carry out a judicial review of the award under the non-arbitrability and public policy provisions, I am however of the view that the courts should exercise moderation in the application of the arbitrability and public policy defences.

As I have noted in this study, non-arbitrable subject matters are inexhaustible. I also note the difficulty of listing exhaustively all arbitrable subject matters. However, in order to achieve a degree of uniformity in state practice, non-arbitrable subject matters should be limited to disputes which cannot generally be compromised lawfully by way of accord and satisfaction. Such disputes should include criminal offences, illegal or immoral contracts (prostitution, slavery etc), matrimonial disputes and disputes arising out of constitutional violations.[108]

It is pertinent that arbitrable subject matters should not be unduly restricted, considering the fact that international business transactions between nationals of different countries are spreading in all areas of commerce due to globalisation and development in

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[108] Ljiljana Biukovic, "Impact of the Adoption of the Model Law in Canada: Creating a New Environment for International Arbitration" (1998) 30 Canadian Business Law Journal 376 at 400.

modern technologies. Therefore, states should refrain from circumscribing the rights of their nationals to engage in business relationships except where such relationship is clearly unjustifiable, such as a business transaction involving slave trading, child labour or breach of constitutional provisions.

In order to provide a degree of certainty for arbitrable subject matters in international commercial arbitration, the courts should be inclined to decide that disputes arising out of a commercial relationship on any of the subject matters contained in the list of commercial relationships appended to Article 1(1) of the Model Law (which are by no means exhaustive) are arbitrable.[109]

With respect to the public policy defence, commentators have distinguished between international and domestic public policy of a state. International public policy of a state usually conforms with an international standard and is, therefore, to a reasonable extent of general application. Presently, international public policy of many nations encourage arbitration and restrict court involvement.[110] The courts of many contracting states to the Convention have continued to favour foreign arbitral awards due to the application of international public policy.[111]

On the other hand, domestic public policy adopts local peculiarities and is very fluid

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[109] Model Law, *supra* note 2, footnote to Article 1(1). See discussion in Chapter 3 at 66.

[110] *Mitsubishi Motors Corp.*, *supra* note 7; *Scherk* v. *Alberto-Culver*, 417 U.S. 506 (1974); *Boart Sweden AB* v. *NYA Stromnes AB* (1988) 41 B.L.R. 295 (Ont. H.C.).

[111] The U.S. and Canadian courts citing "concerns in international comity" have allowed the international arbitration of subject matters that were considered non-arbitrable in domestic arbitration and adopted a narrow interpretation on the public policy defence. See *Mitsubishi Motors Corp.*, *ibid*, *Scherk*, *ibid*, *Boart Sweden*, *ibid* and *Quintette Coal*, *supra* note 71.

and varied amongst states. The application of public policy based on domestic standards will contradict the uniformity objective which the Convention and the Model Law set out to achieve. International public policy which is of a narrower restraint is therefore best applied to international commercial arbitration. Although it must be admitted that the U.S. and Canadian domestic public policy is reflective of the narrow conception of international public policy,[112] the situation may not be the same in many other countries.

Thus, in order that the public policy defence does not amount to the "greatest single threat to the use of arbitration in international commercial disputes",[113] the courts should limit its application to ensuring the integrity of the arbitral proceedings and that the arbitral tribunal applied fundamental fairness.

5.5. *Commentary*

The recommendations contained in this thesis summarily call for elimination of attacks to arbitration based on procedural grounds and argue that such alleged procedural irregularities should be raised in a timely manner, that is, during arbitral proceedings. The Model Law, which supplies necessary details regarding the procedure for conducting arbitration and provides valuable insight into the nature of international arbitration,[114] provides

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[112] See *Shearson/American Express Inc. et al* v. *McMahon et al*, 482 U.S. 220 (1987) where the U.S. Supreme Court extended the narrow construction of in-arbitrable subject matter defence to domestic arbitration. In *Boardwalk Regency* v. *Maalouf* (1992) 6 O.R. (3d) 737 (C.A.), the Ontario Court of Appeal noted that there has been a significant increase in various forms of gambling in the Province of Ontario and elsewhere in Canada and held that the enforcement of foreign judgment based on gambling was not against the Canadian Community standard of morality.

[113] Steward E. Sterk, "Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense" (1981) 2 Cardozo Law Review 481 at 483.

[114] Russell J. Weintraub, *International Litigation and Arbitration: Practice and Planning*, 2nd ed. (North Carolina: Carolina Academic Press, 1997) at 514 -515.

time limits within which objections to any procedural irregularity may be raised.

The current trend in international commercial arbitration is that the parties should be free to select the procedural rules and substantive laws applicable to the resolution of their commercial disputes. In addition, it has become increasingly common for institutional rules to recognise the competence of the arbitral tribunal to rule on their jurisdiction as well as on procedural matters.[115] These have become known as the twin principles of party autonomy and *kompetenz-kompetenz* (the latter referring to the independence of the arbitral tribunal to rule on its jurisdiction). These principles, which are expressly contained in the Model Law, seek as a priority to limit judicial intervention in international commercial arbitration.[116] Thus, while judicial challenge has been allowed only on process issues and not on substantive aspects of the arbitral process and award, the arbitrators have been given broad powers to make decisions on the conduct of the arbitration, subject to the agreement of the parties.[117]

Therefore, I posit that the elimination of procedural grounds for post-award attacks is consistent with the principles of party autonomy and the independence of the tribunal which now give the parties the right to control the arbitral process. The parties having themselves elected to settle their disputes by arbitration, and under the rules of procedure and substantive laws selected by them, should adhere strictly to that procedure and, thus, avoid unnecessary invitation for judicial intervention. All that is required is that any procedural noncompliance should be challenged in a timely manner and by so doing, avoid post-award attacks.

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[115] See Model Law, *supra* note 2, Article 16.

[116] Duncan Miller, "Public Policy in International Commercial Arbitration in Australia" (1993) 9 Arbitration International 167 at 168.

[117] Linda C. Reif, *supra* note 10 at 856.

Although the New York Convention does not address the procedural rules for arbitral proceedings, its pro-enforcement thrust and the various courts' decisions based on the Convention lend credence to the fact that the Convention supports the principles of party autonomy and the independence of the arbitral tribunal. The U.S. courts have shown that even under Convention countries such as the United States, the current trend in international commercial arbitration as contained in the Model Law will be upheld.

The suggestion for moderation in the application of the non-arbitrability and public policy defences is also in keeping with the philosophy of avoiding the application of local standards in transnational disputes.

Above all, the application of the suggestions highlighted in this study will ensure a more effective enforcement mechanism for arbitral awards and prevent loss of valuable resources including cost and time. Attacks on arbitral awards, either through application to set aside the award at the place where the award was made or challenge of the enforcement proceedings, impact negatively on commercial arbitration because such attacks unnecessarily prolong the arbitral process and result in avoidable expense.

Paradoxically, cost effectiveness and expeditious resolution of disputes are the most cherished and often cited advantages and stimulants that inform the decisions of business persons to prefer arbitration over litigation in resolving their commercial disputes.[118] Thus, arbitration can maintain its goal of providing final, speedy and inexpensive settlement of disputes "only if judicial interference with the process is minimised; it is, after all, 'meant to

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[118] See *Folkways Music Publishers, Inc.* v. *Weiss*, 989 F. 2d 108, 111 (2nd Cir. 1993).

be a substitute for and not a springboard for litigation.'"[119]

An issue of concern is the feasibility of implementing some of the recommendations in this study which are predicated on the provisions of the Model Law. This is based on the small number of states that have modified their arbitration laws in line with the Model Law provisions in contrast with the number of contracting states to the New York Convention. Although only about 28 countries and 9 U.S. states have modified their national arbitration laws using the Model Law, it should be noted that before the conclusion of the Model Law some countries had recently modernised their arbitration laws to the standard incorporated in the Model Law.[120]

More recently, other countries have also revised their arbitration laws, being greatly influenced by the Model Law.[121] While these countries have not admitted the influence of the Model Law on their new arbitration laws, it has been noted in the case of England that the new Act would not have been adopted without the earlier advent of the UNCITRAL Model Law.[122] Furthermore, with respect to the U.S. which is an important arbitration state that has not adopted the Model Law at the federal level, its national courts have nevertheless applied the principles in the Model Law in international commercial disputes. This is particularly

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[119] *Chattin* v. *Cape May Green, Inc.*, 524 A. 2d 841 at 850 (N.J Super. Ct. App. Div. 1987).

[120] For example, the *Belgian Arbitration Law* adopted in 1972, the French *Nouveau Code De Procedure Civil*, adopted in 1981.

[121] See the English, Dutch, French and Swiss new Arbitration laws. Syria, Mauritania, Libya and Jordan are at different stages of concluding new arbitration law based on the Model Law. See M. I. M. Aboul-Enein, "The Development of International Commercial Arbitration Law in the Arab World" (1999) 65 Journal of the Chartered Institute of Arbitrators 314 at 318-320.

[122] Gerold Herrmann, *supra* note 90 at 211.

relevant since a sizeable volume of international commercial arbitration proceedings and arbitral award enforcements are conducted in the U.S.[123]

There is no doubt that some of the above recommendations will be more effective if the New York Convention is revised, being the only international legally binding framework on international arbitration. But as I have earlier pointed out, conventional wisdom justifiably views tampering with the Convention as inadvisable because of the political and other problems associated with such exercise. However, the observations noted in this study should be added to other critiques of the New York Convention[124] that may eventually lead to some form of revision of the Convention.

Although the revision or amendment of the Model Law is comparatively easier and desirable, it is, however, not essential as states are free to depart from it when enacting domestic arbitration laws. Therefore, in the meantime, these recommendations may be implemented through the amendment of national arbitration laws. This approach will be more effective considering the relatively small number of countries that have recently changed their domestic arbitration laws using the Model Law. As other countries prepare to modernise their arbitration laws, they should consider incorporating these recommendations. In fact, the dynamic nature of international commercial arbitration requires periodic revision of national arbitration laws to conform with developments in this area.

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[123] The American Arbitration Association compete favourably with other international arbitration institutes such as the London Court of International Arbitration based in London, the Stockholm Arbitration Institute at Sweden, and the International Court of Arbitration of the International Chamber of Commerce at Paris.

[124] Other commentators have also called for the revision of some aspects of the Convention. See Gerold Hermann, *supra* note 90, Mauro Rubino-Sammartano, *supra* note 55, Neil Kaplan QC, "Is the Need for Writing as Expressed in the New York Convention and the Model Law out of Step with Commercial Practice?" (1996) 12 Arbitration International 27, etc.

In addition, lawyers and arbitration practitioners with an understanding of business persons should incorporate provisions in arbitration clauses which reflect the parties' agreement not to resort to post-award attacks. As indicated in this study, the U.S. and Canadian courts have shown their willingness to respect such agreements.

Finally, while the recommendations made above rely on substantive provisions of the Model Law, it is apposite to point out that those provisions are not contradictory to the objectives of the Convention, as shown by the U.S. cases considered in this study. Besides, as noted earlier, the Model Law to a large extent merely incorporates the rules of arbitration procedure that have been recognised in international commercial arbitration practice. To that extent, the Model Law, whether incorporated into domestic laws or not, is been implemented in international commercial arbitration.

CHAPTER 6

CONCLUSION

To state that it is now "unanimously admitted that the last decades have witnessed a dramatic growth of arbitration as the preferred method of settling international commercial disputes"[1] is not an exaggeration. Also, the contribution of the New York Convention and the Model Law to the development of international commercial arbitration cannot be overestimated. These instruments have rendered international commercial arbitral awards enforceable with minimum court intervention in more than one hundred and thirty countries which have acceded to the Convention and/or adopted national arbitration laws based on the Model Law.

The 1958 New York Convention provides an international legal framework for the recognition and enforcement of foreign arbitral awards. The Model Law, by recognising the principles of party autonomy and the independence of arbitral tribunals, entrusted the control of the arbitral process to the will of the parties. This is a remarkable achievement for those who believe that when parties to an international contract have agreed to submit their disputes to arbitration, the court should not intervene.

Most legal systems now support the parties' consensual waiver of recourse to the national courts through their agreement for commercial arbitration. The courts have also acquiesced in the renunciation of their judicial jurisdiction either by enforcing agreements and awards, ordering attachments of assets to secure payment of award or making defective arbitration clauses workable.

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[1] Antoine Kirry, "Arbitrability" Current Trends in Europe" (1996) 12 Arbitration International 373.

Thus, while the U.S. was hesitant in accepting international arbitration, as exemplified by its initial reluctance to become a signatory to the Convention, after it became a contracting state to the New York Convention the U.S. courts have pursued a consistent and well-articulated policy of recognising and enforcing foreign arbitral awards. The courts have strictly applied the Convention, narrowly interpreting the exceptions to the enforcement of awards stated in Article V of the Convention.

Canada also went to great lengths in reforming its national arbitration laws by implementing the New York Convention and adopting the Model Law into domestic federal and provincial statutes. This step has revolutionised international commercial arbitrations and enforcement of arbitral awards in Canada. The courts have shown a pro-enforcement bias by adopting narrow interpretations of the grounds for challenging arbitral awards under Article 36 of the Model Law. This is commendable because a parochial judicial attitude towards international commercial arbitration laws would have defeated the objectives of the Canadian legislative initiative.[2]

Although there are a paucity of cases on international commercial arbitration in the Canadian courts to date, the decisions in one province will be persuasive in the other provinces because the arbitration laws of the territories and provinces are similar, and are identical in some provinces. In addition, the U.S. court decisions should also be of persuasive effect in Canadian courts because both the U.S. and Canadian courts have evidenced a pro-

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[2] See Linda C. Reif, "Recent Developments in International Economic & Business Law" (1991) 2 (Papers presented at Mid-Winter Meeting of the Canadian Bar Association, Alberta Branch) 805 at 857.

arbitration attitude.[3]

Thus, the New York Convention and the Model Law have ensured the relative ease with which arbitral awards are now enforced, inspiring deep confidence in the efficacy of the whole arbitration process within the international business community. The support of the courts is, however, subject to the condition that mandatory procedural safeguards must be available to protect against arbitrators who exceed the limits of their jurisdiction or corrupt the arbitral process. It is in order to ensure this safeguard that I have recommended the creation of arbitral appeals tribunals to provide an in-house scrutiny of arbitral awards. In addition, national judicial assistance given to arbitration entails concomitant obligations to uphold the integrity of the decision making process; thus, a moderate application of the non-arbitrability and public policy defences should be geared towards the realisation of this objective.

However, in a dynamic field such as international commercial arbitration which responds quickly to globalisation, changes must be made at the international level to conventions which regulate international commercial arbitration. Already, the courts and the entire business community have identified with this change. As Professor Okezie Chukwumerije aptly observed, "traditional judicial hostility to arbitration has been abandoned, and the courts have articulated a new vision of arbitration that attempts to balance the autonomy of the parties with other judicial considerations."[4] He therefore suggested that:

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[3] The U.S. courts have increasingly permitted arbitration of sensitive public law issues, such as antitrust, securities regulation, that were traditionally deemed non-arbitrable. The Canadian courts have equally given preference to international arbitration as against statutory arbitration procedures provided in the lien stautes.

[4] Okezie Chukwumerije, "Reform and Consolidation of English Arbitration Law" (1997) 8 American Review of International Arbitration 21 at 28.

> The legislative articulation of an improved version of this philosophy will enable a more theoretical and purposive focus to judicial control of, and assistance to, arbitration. It also provides a useful legislative standard by which judicial decisions on arbitral matters can be more critically evaluated.[5]

The Convention has been very helpful to international commercial arbitration. However, it has to be accepted that a lot of change has occured in commercial arbitration since 1958. Therefore, the call for the modification of the New York Convention and the Model Law is to give legal effect to this change and, in so doing, the instruments will maintain their paramount purpose of ensuring a large measure of certainty and security in promoting international commercial transactions.[6]

The New York Convention and the Model Law should not be regarded as infallible documents nor should their demonstrated success foreclose the need to revise these laws in order to meet new needs of the international trading community.[7] As we approach the twenty-first century, recent developments in international commercial arbitration demand a modification of certain aspects of the Convention and the Model Law, some of which are highlighted in this study.

Admittedly, the magnitude of amending the New York Convention appears to be insuperable on account of the large number of contracting states to the Convention. However, such change should not be completely ruled out. The Convention certainly needs

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[5] Okezie Chukwumerije, *supra* note 4 at 28.

[6] Hamid G. Gharavi, "Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention" (1996) 6 Journal of Transnational Law & Policy 93 at 108.

[7] Jacques Werner, "The Trade Explosion and some Likely Effects on International Arbitration (1997) 14 Journal of International Arbitration 5 at 15.

to be reformed after more than forty-one years of operation. As Professor Oliver Wendell Holmes once stated, "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[8]

In addition, UNCITRAL should consider periodic updating of the Model Law to keep pace with the developments in international commercial arbitration and to ensure that the Model Law remains modern to states considering adopting it into their national arbitration law. Meanwhile, states intending to adopt national arbitration laws should also ensure that such laws reflect current developments in order that they do not become outdated before their implementation.

While the current commendable pro-enforcement bias of the courts should be maintained along the lines suggested in this study, efforts must be made to curtail the resort of parties to post-arbitration challenge which tends to deflate the arbitral process of its efficiency, transforming the process into a preliminary step towards litigation. The suggested recommendations are not foolproof or all-encompassing but are, in my view, necessary to restrain abuse of the arbitral process while permitting judicial review to protect the integrity of international commercial arbitration.

Where possible, avenues which encourage avoidable post-award attacks should be prevented because judicial review of arbitral awards adds delay and expense, and compromises the privacy and all other advantages that the parties expected from arbitration.

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[8] Oliver Wendell Holmes, "The Path of the Law" (1897) 10 Harvard Law Review 457 at 469.

APPENDIX I

EXTRACTS OF THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, 1958

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for the recognition and enforcement shall, at the time of the application, supply:
   (a) The duly authenticated original or a duly certified copy thereof;
   (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the

decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

APPENDIX II

EXTRACTS OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, 1985

CHAPTER VII
RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not conptemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only the part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) The court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed

from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII
RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to

arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) If the court finds that:

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

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